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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

No. 41

LESLIE IRVIN, PETITIONER

vs.

A. F. DOWD, WARDEN

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR HABEAS CORPUS FILED JANUARY 10, 1900

HABEAS CORPUS GRANTED FEBRUARY 20, 1900

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A. F. DOWD, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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1 IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

No. 42080

SEPTEMBER TERM, 1957, JANUARY SESSION, 1958

LESLIE IRVIN, PETITIONER-APPELLANT

v.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

Opinion—January 29, 1958

Before DUFFY, *Chief Judge*, and FINNEGAN and SCHNACK-
ENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. . From an order of the
district court dismissing his petition for a writ of habeas
corpus, petitioner has appealed to this court.¹

The controlling facts are set forth in the opinion of the
district court, 153 F. Supp. 531, and in the opinion of the
Indiana Supreme Court in *Irvin v. State*, 236 Ind. 384, 139
N.E. 2d 898.

Defendant was tried in the Circuit Court of Gibson County,
Indiana, on an indictment charging him with murder. On
December 20, 1955 a verdict finding him guilty of murder
was returned by the jury and, on January 9, 1956, a judgment
was entered on the verdict and he was sentenced to
2 death. On January 18, 1956 defendant escaped from the
county jail and his whereabouts was not known on Jan-
uary 19, 1956, at which time the trial court was informed by
the sheriff of these circumstances. At the same time the de-

¹ Petitioner is also referred to herein as "defendant."

defendant's attorneys filed a motion for a new trial, charging 415 errors committed by the trial court, including several attacking the impartiality of the jurors. The trial court's order of January 23, 1956 recites that defendant's attorneys filed with the court a copy of a letter received from defendant reading, in part, as follows:

"Wednesday

January 18, 1956

"Dear Ted:

I know this is the wrong thing to do, but I can't just go up to Michigan City and wait. If, they ever give me a new trial, I'll come back and face it. Maybe the jury then will believe the truth. * * *

By said order the court overruled the motion for a new trial. Defendant then appealed to the Supreme Court of Indiana, which affirmed the judgment below. *Irvin v. State, supra.*²

In this case there is no disagreement with the well-established principle that a person convicted of a criminal offense in a state court has no right to prosecute a petition for a writ of habeas corpus in a federal court, based upon an alleged violation of his federal constitutional rights, unless he has exhausted his available state remedies. *Brown v. Allen*, 344 U.S. 443, 487. This principle has found repeated recognition, including our decision in *United States v. Ragen*, 224 F. 2d 611, 614.

It must be borne in mind that, unless and until defendant shows that he has exhausted remedies afforded him by the state of Indiana, we are not permitted to consider whether his federal constitutional rights were violated at his trial.

However the parties hereto are not agreed on whether defendant did exhaust Indiana's remedy of appeal to the Su-

preme Court of Indiana, of which he chose to avail himself. The only assignment of error by defendant in the Supreme Court of Indiana was that the trial court erred in overruling his motion for a new trial.

The state supreme court thoroughly considered the law as announced in numerous court decisions, and held, at 901,

² The Supreme Court of the United States denied certiorari to the Supreme Court of Indiana "without prejudice to filing for federal habeas corpus after exhausting state remedies." 353 U.S. 948.

"* * * If a prisoner escapes he is not entitled during the period he is a fugitive to any standing in court or to file any plea or ask any consideration from such court."

That court pointed out:

"* * * There is no showing that the appellant voluntarily surrendered himself. Instead, counsel in argument admitted that he remained a fugitive from justice until he was recaptured in the state of California. This occurred some considerable time after the period within which the motion for a new trial could have been filed. The time ran out on appellant while he was voluntarily a fugitive from justice.

"The action upon which the appellant predicates error in this appeal is based *solely upon the overruling of a motion for a new trial*. There is no other error claimed. Since appellant had no standing in court at the time he filed a motion for a new trial the situation is the same as if no motion for a new trial had been filed, or he had voluntarily permitted the time to expire for such filing. His letter reveals he was aware of this right, and had talked with his attorneys about a new trial and an appeal.

"No error could have been committed in overruling the motion for a new trial under the circumstances."
(Italics supplied for emphasis.)

We must accept as an authoritative statement of the law of Indiana what its supreme court said in the foregoing language. Therefore, briefly stated, the state law applicable to the facts in the record, is: Only by his motion for a new trial presented and argued to the court, while the court had custody of the defendant, could he have taken the first step in his resort to the remedy of appeal afforded him by the law of Indiana.

We think it is plain from a reading of defendant's letter, written after his escape, that he did not intend to again submit himself to the custody of the trial court if that court did not, in advance of such submission by him, grant him a new trial. It follows that if the court, after

laborious consideration of the multitudinous grounds asserted by defendant, had denied his motion for a new trial, he would not have voluntarily returned and, if not recaptured, the trial court would have been powerless to enforce its judgment against him. Defendant did not exhaust the remedy afforded him by the law of Indiana. Instead he sought to substitute a remedy of his own creation, which in its operation would have permitted him, from a secret hiding place, by remote control, to coerce the trial court to do his bidding. Thereby he sought to transform the court of a sovereign state into a mere puppet. Indiana had furnished him a remedy, simple and complete, originating in a motion for a new trial and leading by appeal to the highest court in the state. The trial court was in session in its accustomed place to hear such a motion; defendant was not there. There was nothing for the court to do but deny the motion, which it did.

As we have seen, on an appeal to the Supreme Court of Indiana, the action of the trial court was affirmed. We are in accord with the district court, because, in such a situation, a defendant in a criminal case is not entitled to relief in a federal court based upon the alleged violation of his rights derived from the constitution of the United States.

In *Allen v. Georgia*, 166 U.S. 138, Allen procured a writ of error from the United States Supreme Court, to review an order of the Supreme Court of Georgia, dismissing a writ of error from that court to a Superior Court in that state. The latter writ sought to reverse the conviction of Allen for murder. In the federal court Allen relied upon the due process of law provisions of the federal constitution. The facts showed that, after Allen had been convicted and sentenced to death by the Superior Court, he made a motion for a new trial, which was overruled. When his case in the state supreme court was called, it was made to appear by affidavits that, after his conviction and sentence, Allen escaped from jail and was at that time a fugitive from justice. Thereupon the court ordered the writ of error dismissed, unless he surrendered within 60 days or should be recaptured within that time, so as to be subject to the jurisdiction of the court. After the 60 days expired, it appearing that he had not surrendered him-

5 self or been rearrested, the Georgia Supreme Court dismissed the writ of error and its judgment was thereafter made the judgment of the Superior Court. Afterwards Allen, having been recaptured, was resentenceed to death by the Superior Court, whereupon the writ of error issued from the United States Supreme court, which pointed out, at 140:

"* * * In a similar case from the Supreme Court of Nebraska, *Bonahan v. Nebraska*, 125 U.S. 692, wherein it appeared that, pending the writ of error from this court, the plaintiff in error had escaped, and was no longer within the control of the court below, it was ordered that the submission of the cause be set aside, and unless the plaintiff were brought within the jurisdiction of the court below on or before the last day of the term, the cause should be thereafter left off the docket until directions to the contrary. A like order under similar circumstances was made in *Smith v. United States*, 94 U.S. 97."

The court also said, at 141:

"We cannot say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody * * * he is put in a position of saying to the court: 'Sustain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial and I will leave the State, or forever remain in hiding.' We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody."

The court in the *Allen* case cited *Commonwealth v. Andrews*, 97 Mass. 543, saying that it was there held that where the defendant escaped during the pendency of his case in the state

supreme court, he could not be heard by attorney, the defendant not being present in person; and that if a new trial were ordered, he was not there to answer further, and that if the exceptions were overruled, a sentence could not be pronounced or executed upon him. The United States Supreme Court quoted with approval the following language from the *Andrews* case, at 544:

"So far as the defendant had any right to be heard under the constitution, he must be deemed to have waived it by escaping from custody and failing to appear and prosecute his exceptions in person, according to the order of court under which he was committed."

The court also cited with approval *Sargent v. The State*, 96 Ind. 63. In that case Sargent was convicted of a felony under Indiana law and took an appeal to the state supreme court. However before his appeal was filed in that court, he escaped from custody. When this matter was made known to the supreme court the appeal was dismissed. The Indiana court pointed out that Sargent was not in the custody or under the control of the trial court or its officers at the time the bill of exceptions appearing in the record was signed and filed. At 65, the court said:

"* * * It must be taken as true, therefore, that the defendant, Sargent, before and at the time this appeal was attempted to be taken, was and still is at large as an escaped convict, and that such attempted, appeal, though nominally taken by him and in his name, was in fact taken by the attorney who appeared for and represented him during the progress of the cause in the court below."

The Indiana Supreme Court said, at 66:

"* * * It may well be doubted, we think, whether this appeal was legally taken in the name of the defendant, Sargent, when it appears, as it does, that all the steps required by the statute, in taking an appeal in a criminal action, were taken in this case after his escape from the custody of the law. Section 1887, R.S. 1881. But, waiving this point, we are convinced that it is no part

of our duty, as an appellate court, to entertain the appeal of the defendant, Sargent, in this case, and review the decision and orders or rulings of which he complains, while he is at large as an escaped convict. * * *

The Indiana court also said:

"It is the constitutional right of the accused, in all criminal prosecutions 'to be heard by himself and counsel;' but it must be held, we think, that he has no right to appear by counsel alone, after he has escaped from lawful custody and is at large. Such has been the uniform holding of the courts of last resort in other jurisdictions, and it meets our full approval. * * *

The appeal was dismissed.

Smith v. United States, 94 U.S. 97 was also cited in the *Allen* case. In the *Smith* case, the court said:

"* * * In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case."

In the case at bar the trial court was not required to consider defendant's motion for a new trial while he was a fugitive. It was not required to hear and decide what, from then existing facts, might prove to be only a moot case.

An escape of a prisoner from custody has the same effect upon proceedings in his case in the trial court as it does in a reviewing court upon appeal from a conviction. The Indiana Supreme Court in defendant's appeal recognized that fact when, in relying upon *Allen v. Georgia*, *supra*, and other cases, it said of defendant, at 900:

¹The court then quoted with approval a part of the language of Chief Justice Waite in *Smith v. United States*, 94 U.S. 97, set forth by us, post 7.

“... He was asking the court through ostensible counsel to do a futile or useless act, depending upon *his whim or decision* as to whether or not he would finally or voluntarily surrender himself for a new trial. There was only one ruling the trial court could make in this case under the circumstances which were created by the appellant's own act of escape, and that was to deny or overrule the motion for a new trial.

Courts do not grant new trials on the basis of bargaining with a defendant at large. It is an affront to the court, and contemptuous to express such assumption. If the court had granted his request for a new trial, and he had thereupon voluntarily surrendered, the appearances of a bargain would have been substantiated. *Smith v. United States*, 1876, 94 U.S. 97, 24 L. Ed. 32.”

This ruling did not violate any of defendant's rights under the due process clause of the federal constitution.

Defendant did not exhaust his remedies under the law of Indiana. By his escape he abandoned the remedy to which his attorneys resorted. In *Brown v. Allen*, *supra*, at 487, the court pointed out that “To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.”

For the reasons hereinbefore set forth, the judgment of the district court is affirmed and the stay of execution heretofore entered herein is vacated.

AFFIRMED AND STAY OF EXECUTION VACATED.

FINNEGAN, *Circuit Judge*, Concurring. In my study of this case one point lost but lurking throughout the extensive record encompassing the Gibson Circuit Court proceedings, implemented by evidence taken in the United States District Court emerges into sharp focus. Counsel for Irvin grounded their petition for a writ of habeas corpus, filed in the United States District Court on allegedly constitutional deprivations arising before Irvin's escape from jail. The adverse ruling on the

motion for a new trial, by the Indiana judge, and Indiana Supreme Court's decision on that point are unchallenged. Irving does not expressly say that overruling his motion for a new trial violated his rights under the Fourteenth Amendment. He had access to the Indiana Supreme Court on appeal from his conviction. Indeed the brief filed for him in our court informs us " * * * he was permitted to appeal without objection, counsel were appointed for * * * [him] for the purpose of appealing his conviction in the Gibson Circuit Court to the Indiana Supreme Court * * * "

We are reviewing a District Judge's findings of fact and conclusions of law underpinning a judgment approving the Indiana detention as being legal and denying a petition to stay execution. *Irvin v. Dowd*, 153 F. Supp. 531 (D.C. Ind. 1957). Rule 52, Federal Rules of Civil Procedure circumscribes our review of findings of fact in appeals where habeas corpus has been refused below. *Hunter v. Dowd*, 198 F. 2d 13 (7th Cir. 1952). Judge Parkinson, then presiding as District Judge, held a hearing on Irvin's petition and received some testimony. Measured by Rule 52, his relevant findings of fact can be left undisturbed.

Requiring as it does exhaustion of remedies available in state courts, the statute (28 U.S.C. § 2254) precluded relief in the district court. Nothing in the record before us suggests any official interference or incapacity justifying Irvin's failure to use the Indiana remedy by appeal. *Brown v. Allen*, 344 U. S. 443, 485-486 (1952). Again I point out we are not called upon, nor can we now review, the Indiana Supreme Court's holding that no error was committed "in overruling the motion for a new trial under the circumstances." 139 N.E. 2d 898, 902. Since the point is not raised on Irvin's behalf, he abandoned his motion for a new trial by departing from the Gibson Circuit Court's jurisdiction. Only an attack on the Indiana holding that its corrective judicial process was forfeited would put in issue such proposition.

By his flight after verdict, Irvin forfeited a timely appeal to the Indiana Supreme Court for the purposes of obtaining review of the adverse ruling on his motion for a new trial. But he was no longer at large when the State Supreme Court

handed down its opinion reported as *Irvin v. Indiana*, 139 N.E. 2d 898 (1957). That fact distinguishes the situation facing our court from *Eisler v. United States*, 338 U.S. 189 (1949) in so far as there could possibly be any question about reviewing a conviction while a defendant-appellant is a fugitive from the state reviewing tribunal's jurisdiction.

10 Though the Indiana Supreme Court viewed Irvin's case as if no motion for a new trial had been filed, and consequently found that the denial of it was procedurally sound, that tribunal pressed further, saying, *inter alia*: " * * * however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that *there is no miscarriage of justice in this case.*" *Irvin v. Indiana*, 139 N.E. 2d 898, 902 (1957). (Italics added.) After relating and discussing various evidentiary elements disclosed by the record the Indiana court concluded (*Id.* at 902): "It does not appear from the record and argument had, that the appellant was denied due process of law under the Fourteenth Amendment, or due course of law under the Bill of Rights, Const. art. 1, § 12 or that there was any miscarriage of justice when he (Irvin) was convicted and given the death penalty." (*Id.* at 902.) Certainly those quoted passages manifest a cautionary mood and judicial reluctance to rely solely on a technicality, regardless of its validity. Of course I think whatever was said by the Indiana Court after passing their decision point on the motion, was *dicta*. Supporting that motion were some 415 alleged reasons and grounds, among which a fair proportion concerned aspects of the jury problem and they, I assume, were unreviewed for the reasons already stated.

DUFFY, *Chief Judge*, concurring.

Irvin was not accorded due process of law in the trial which resulted in his conviction and death sentence. In my judgment, he did not receive a fair trial because some of the jury had pre-conceived opinions as to defendant's guilt, and also because of the conduct of the prosecuting attorney. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison et al.*, 349 U.S. 133, 136.

More than half of the jurors who sat in the case had preconceived ideas that defendant was guilty of the offense charged. Some testified on the *voir dire* that it would take evidence to change that opinion. Defendant exhausted his twenty peremptory challenges. His motion for a continuance had been denied.

11 I realize that a prolonged effort was made to obtain an impartial jury. 431 prospective jurors were questioned. 269 were successfully challenged for cause. Nevertheless, the jury, as finally constituted, in my opinion, was not impartial. Probably it was as impartial as could be found in Gibson County on that date, but that was not sufficient to insure due process.

Another reason for the failure of due process was that the prosecuting attorney also acted as a witness on the trial. Mr. Wever participated in examining prospective jurors, interposed objections to testimony, and otherwise participated in the trial. He then took the stand as a witness and testified concerning a confession made to him. Over objection, he made the closing argument to the jury and commented on the evidence including his own testimony. Such conduct was in violation of Canon 19 of the Canons of Professional Ethics. Such conduct was offensive to the rights of a defendant to a fair and impartial trial.

In spite of my belief that there was failure to accord defendant due process in his trial, I am convinced for the reasons stated in Judge Schnackenberg's opinion, that defendant is in no position to maintain a writ of habeas corpus in a federal court. By his escape from custody after he had been convicted and sentenced, he elected to embark upon a course of conduct which, under Indiana law, was a waiver of his right to appeal to the Indiana Supreme Court. In deference to the authorities cited in Judge Schnackenberg's opinion, I must agree defendant did not exhaust his available state remedies, and the District Court correctly dismissed the petition for a writ of habeas corpus.

12

LESLIE IRVIN VS. A. F. DOWD, WARDEN

12

IN UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT,

No. 12080

LESLIE IRVIN, PETITIONER-APPELLANT

vs.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

Judgment—January 29, 1958

Before Hon. F. RYAN DUFFY, *Chief Judge*; Hon. PHILIP J. FINNEGAN, *Circuit Judge*; Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, *Affirmed*.

It is further ordered that, when this Court's mandate in this cause is hereafter issued herein, the stay of execution heretofore entered in this Court be vacated.

13

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

(Title omitted)

Order denying petition for rehearing—February 19, 1958

Before Hon. F. RYAN DUFFY, *Chief Judge*; Hon. PHILIP J. FINNEGAN, *Circuit Judge*; Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*.

It is ordered by the Court that the appellant's petition for a rehearing of this cause be, and the same is hereby, *Denied*.

SUPREME COURT OF THE UNITED STATES

No. 63.—OCTOBER TERM, 1958.

Leslie Irvin, Petitioner, v. Alfred F. Dowd, Warden of the Indiana State Prison.	}	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
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[May 4, 1959.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner brought this habeas corpus proceeding in the District Court for the Northern District of Indiana under 28 U. S. C. § 2241,¹ claiming that his conviction for murder in the Circuit Court of Gibson County, Indiana was obtained in violation of the Fourteenth Amendment. The District Court dismissed the writ, 153 F. Supp. 531, under the provision of 28 U. S. C. § 2254 that habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state" ² The Court of Appeals for

¹ Section 2241 provides in pertinent part:

"(a) Writs of habeas corpus may be granted by the . . . District courts . . . within their respective jurisdictions.

"(c) The writ of habeas corpus shall not be extended to a prisoner unless . . .

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . "

² The full text of § 2254 is as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of

the Seventh Circuit affirmed. 251 F. 2d 548. We granted certiorari, 356 U. S. 948.

The constitutional claim arises in this way. Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized, stating that the petitioner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner,

circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The case was here previously on Irvin's petition seeking direct review on certiorari to the Indiana Supreme Court from that court's decision in *Irvin v. State*, 236 Ind. 384. Certiorari was denied "without prejudice to filing for federal habeas corpus after exhausting state remedies," 353 U. S. 948. The Indiana Assistant Attorney General, on the oral argument here, advised that there was not then, nor is there now, any state procedure available for the petitioner to obtain a determination of his constitutional claim.

counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue.³

The *voir dire* examinations of prospective jurors began in Gibson County on November 14, 1955. The averments as to the prejudice by which the trial was allegedly environed find corroboration in the fact that from the first day of the *voir dire* considerable difficulty was experienced in selecting jurors who did not have fixed opinions that the petitioner was guilty. The petitioner's counsel therefore renewed his motion for a change of venue, which motion was denied. He renewed the motion a second time, on December 7, 1955, reciting in his moving papers: "in the *voir dire* examination of 355 jurors called in this case to qualify as jurors 233 have expressed and formed their opinion as stated in said *voir dire*, that the defendant is guilty" Again the motion was denied. Alternatively on each of eight days over the four weeks required to select a jury, counsel sought a continuance of the trial on the ground that a fair trial at that time was not possible in the prevailing atmosphere of hostility toward the petitioner. All of the motions for a continu-

³ Burns Ind. Stat. Ann., 1956 Replacement Vol., § 9-1305, provides:

"When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases punishable by death, shall grant a change of venue to the most convenient county. The clerk must thereupon immediately make a transcript of the proceedings and orders of court, and, having sealed up the same with the original papers, shall deliver them to the sheriff, who must, without delay, deposit them in the clerk's office of the proper county, and make his return accordingly: Provided, however, That only one [1] change of venue from the judge and only one [1] change from the county shall be granted."

ance were denied. The State Prosecutor, in a radio broadcast during the second week of the *voir dire* examination, stated that "the unusual coverage given to the case by the newspapers and radio" caused "trouble in getting a jury of people who are not [*sic*] unbiased and unprejudiced in the case."

The petitioner's counsel exhausted all 20 of his preemptory challenges; and when 12 jurors were ultimately accepted by the court also unsuccessfully challenged all of them for alleged bias and prejudice against the petitioner, complaining particularly that four of the jurors, in their *voir dire* examinations, stated that they had an opinion that petitioner was guilty of the murder charged.

Also, at the trial, the State's Prosecuting Attorney took the stand as part of his presentation of the State's case, and over petitioner's objection was allowed to testify that the petitioner, five days after his arrest, on April 13, 1935, had orally confessed the murder of Kerr to him. The Prosecuting Attorney was also permitted in summation, again over petitioner's objection, to vouch his own testi-

* The trial judge qualified the jurors in question under the authority of Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9-1504, which provides:

"The following shall be good causes for challenge to any person called as a juror in any criminal trial:

"Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

mony by commenting to the jury, "I testified myself what was told me."

The opinions of the Indiana Supreme Court and the District Court held the constitutional claim to be without merit. *Irvin v. State*, 236 Ind. 384, 392-394; *Irvin v. Dowd*, 153 F. Supp. 531, 535-539. On the other hand, Chief Judge Duffy of the Court of Appeals, concurring in the affirmance of the dismissal by the District Court, reached a contrary conclusion: "Irvin was not accorded due process of law in the trial which resulted in his conviction and death sentence. In my judgment, he did not receive a fair trial because some of the jury had preconceived opinions as to defendant's guilt, and also because of the conduct of the prosecuting attorney." 251 F. 2d 548, 554.

The Gibson County jury returned its verdict on December 20, 1955, and assessed the death penalty. Indiana law allows 30 days from the date of the verdict within which to file a motion for a new trial in the trial court. Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9-1903. The petitioner's counsel, on January 19, 1956, the 30th day, filed such a motion specifying 415 grounds of error constituting the alleged denial of constitutional rights. However, the petitioner had escaped from custody the night before, January 18, 1956, and on January 23, 1956, the trial court overruled the motion, noting that the petitioner had been an escapee when the motion was filed and was still at large. The petitioner was captured in California about three weeks later and, on February 17, 1956, was confined in the Indiana State Prison.

Under Indiana law the denial of the new trial was not appealable, but was reviewable by the Indiana Supreme Court only if assigned as error in the event of an appeal from the judgment of conviction. The State Supreme Court has held:

"The statute [providing for appeal] does not authorize an appeal from every ruling which a court

may make against a defendant in a criminal action, but only authorizes an appeal 'from any judgment . . . against him,' and provides for review upon such appeal, of decisions and rulings of the court made in the progress of the case. This court has construed the statute as authorizing an appeal only from a final judgment in a criminal action. The action of a trial court in overruling a motion for a new trial may be reviewed upon an appeal from a judgment of conviction rendered against a defendant, but the overruling of a motion for a new trial must be assigned as error. In such case the appeal is from the judgment of conviction and not from the ruling upon the motion for a new trial. The overruling of a motion for a new trial does not constitute a judgment and an appeal does not lie from the court's action in overruling such motion." *Selke v. State*, 211 Ind. 232, 234.

The judgment of conviction imposing the death sentence was entered January 9, 1956. The petitioner was entitled to appeal, as a matter of right, from that judgment, provided, in compliance with a State Supreme Court rule.

* Rule 2-2 of the Supreme Court of Indiana, Burns' Ind. Stat. Ann., 1946 Replacement Vol. 2, pt. 1, p. 8, provides:

"Time for appeal or review.—In all appeals and reviews the assignment of errors and transcript of the record must be filed in the office of the clerk of the Supreme Court within 90 days from the date of the judgment or the ruling on the motion for a new trial, unless the statute under which the appeal or review is taken fixes a shorter time, in which latter event the statute shall control. If within the time for filing the assignment of errors and transcript, as above provided, it is made to appear to the court to which an appeal or review is sought, notice having been given to the adverse parties, that notwithstanding due diligence on the part of the parties seeking an appeal or review, it has been and will be impossible to procure a bill of exceptions or transcript to permit the filing of the transcript within the time allowed, the court to which the appeal or review is

the appeal was perfected by filing with the Clerk of the Supreme Court a transcript of the trial record and an assignment of errors within 90 days of the judgment. The Supreme Court may, in its discretion, extend the time on proper motion made within the 90-day period. The questions before the Supreme Court are those raised by the appellant in his assignment of errors.

On March 22, 1956, the petitioner applied for an extension of time within which to file the trial transcript and his assignment of errors. This was after he was returned to the custody of the State and well within 90 days from January 9, 1956, the date of the judgment of conviction. We were advised on oral argument that the State objected to this motion "because he [petitioner] had escaped," and a hearing was held on the objection by the State Supreme Court. Petitioner's motion was granted and the time was extended to June 1, 1956. The assignment of errors, timely filed with the trial transcript of some 5,000 pages, assigned only one ground of error—that "the [trial] Court erred in overruling appellant's motion for new trial." The petitioner's brief of over 700 pages opened by advising the State Supreme Court that "Under this single assignment of error, the appellant has combined all errors alleged to have been committed

sought may, in its discretion, grant a reasonable extension of time within which to file such transcript and assignment of errors. When the appellant is under legal disability at the time the judgment is rendered, he may file the transcript and assignment of errors within 90 days after the removal of the disability."

The statutory provision for appeal is Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9-2301, which provides:

"Appeal by defendant—Decisions and orders reviewed.—An appeal to the Supreme Court . . . may be taken by the defendant as a matter of right, from any judgment in a criminal action against him, in the manner and in the cases prescribed herein; and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed."

prior to the filing of the motion for a new trial." In short, the form of the assignment was a short-hand way of specifying the 415 grounds stated in the motion for new trial as constituting the claimed denial of constitutional rights. Indeed the only arguments made in the lengthy brief related to the constitutional claim. The State's brief devoted some 70 pages to answering these contentions, and in 7 additional pages argued that in any event the Circuit Court had not erred in denying the motion for a new trial because the petitioner was an escapee at the times it was filed and decided.

The case before the Indiana Supreme Court was thus an appeal perfected in full compliance with Indiana procedure; therefore, the court was required under Indiana law to pass on the merits of the petitioner's assignment of error. That the assignment of error was sufficient to present the constitutional claim is evident from the court's acceptance of it as the basis for considering the 415 grounds of alleged error constituting that claim. However, under the single assignment of error, the judgment of conviction could be affirmed by the State Supreme Court if, for any reason finding support in the record, the motion for a new trial was properly overruled. The State argued that the overruling should be upheld on either of two grounds: one, because the petitioner was an escapee at the time the motion was made and decided, and, two, because the trial itself was fair and without error. Petitioner's appeal clearly raised both of these issues and the Indiana Supreme Court discussed both in its opinion.

We think that the District Court and Court of Appeals erred in concluding that the State Supreme Court decision rested on the ground that the petitioner was an escapee when his motion for a new trial was made and decided. On the contrary, the opinion to us is more reasonably to be read as resting the judgment on the holding that the petitioner's constitutional claim is without merit. As we

have shown, under the state procedure, the State Supreme Court could have rested its decision solely on the federal constitutional claim.⁷ This, we think, is what the Indiana high court did. The opinion discusses both issues. The discussion of the escape issue concludes with the statement, "No error could have been committed in overruling the motion for a new trial under the circumstances." 236 Ind., at 392. But the opinion proceeds: "Our decision on the point under examination makes it unnecessary for us to consider the other contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in the case." *Id.*, at 392-393. The conclusion reached after discussion of the merits is: "It does not appear from the record and argument had, that the appellant was denied due process of law under the Fourteenth Amendment" *Id.*, at 394. The court's statement that its conclusion on the escape point made it "unnecessary" to consider the constitutional claim was not a holding that the judgment was rested on that ground. Rather the court proceeded to determine the merits "because of the finality of the sentence" and "to satisfy ourselves that there is no miscarriage of justice." In this way, in our view, the State Supreme Court discharged the obligation which rests upon "the State courts, equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States" *Robb v. Connolly*, 111 U. S. 624, 637. We thus believe that the opinion is to be read as rested upon the State Supreme Court's considered conclusion that the conviction resulting in the death sentence was not obtained in disregard of the protections secured to the petitioner by the Constitution of the United States.

⁷ This conclusion was also expressed on the oral argument in this Court by the State's Assistant Attorney General.

In this posture, 24 U. S. C. § 2254 does not bar the petitioner's resort to federal habeas corpus. The doctrine of exhaustion of state remedies in federal habeas corpus was judicially fashioned after the Congress, by the Act of February 5, 1867, greatly expanded the habeas corpus jurisdiction of the federal courts to embrace "all cases where any person may be restrained of his . . . liberty in violation of the constitution; or of any treaty or law of the United States" 14 Stat. 385. Although the statute has been re-enacted with minor changes at various times the sweep of the jurisdiction granted by this broad phrasing has remained unchanged.*

Since there inhered in this expanded grant of power, beside the added burden on the federal courts, the potentiality of conflict between federal and state courts, this Court, starting with the decision in *Ex parte Royall*, 117 U. S. 241, developed the doctrine of exhaustion of state remedies, a "rule . . . that the . . . Courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a state in violation of the Constitution, . . . yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of a State, . . ." *Tinsley v. Anderson*, 171 U. S. 101, 104-105. The principles are now reasonably clear. "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted." *Ex parte Hawk*, 321 U. S.

* The substance of the original Act of 1867 is now found in 28 U. S. C. § 2241, see note 1, *ante*.

114, 116-117. The principles of the doctrine have been embodied in 28 U. S. C. § 2254 which was enacted by Congress to codify the existing habeas corpus practice. See *Darr v. Burford*, 339 U. S. 200, 210-214; *Young v. Ragen*, 337 U. S. 235, 238, note 4; *Brown v. Allen*, 344 U. S. 443, 447-450. As is stated in the Reviser's Note: "This new section is declaratory of existing law as affirmed by the Supreme Court."

The petitioner in this case plainly invoked "all state remedies available" and obtained "a final determination" of his constitutional claim from the Indiana Supreme Court. Certainly *Brown v. Allen*, 344 U. S. 443, relied upon by the Court of Appeals, does not bear on his situation. In that case the two petitioners in *Daniels v. Allen* had 60 days in which to make and serve a statement of the case on appeal from a conviction in the state trial court. Counsel failed to serve this statement until 61 days had expired, and the trial judge struck the appeal as out of time. The pertinent North Carolina rule provided that the time limitation was "mandatory," and precluded an appeal to the State Supreme Court. The State Supreme Court dismissed petitioners' attempted appeal on the ground that no appeal had been filed. This Court held that under the doctrine of exhaustion of state remedies habeas corpus ought not be granted since petitioners had sought too late to invoke North Carolina's "adequate and easily-complied-with method of appeal." 344 U. S., at 485. In contrast, the petitioner's appeal from his judgment of conviction to the Indiana Supreme Court raising the constitutional claim was timely and was accepted by that court as fully complying with all pertinent procedural

⁹ For the legislative history, see H. R. Rep. No. 2646, 79th Cong., 2d Sess., p. A172; H. R. 3214, 80th Cong., 1st Sess.; H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A180; S. Rep. No. 1559, 80th Cong., 2d Sess., pp. 9-10.

requirements. Furthermore, the State Supreme Court did reach and decide petitioner's federal constitutional claim.

We therefore hold that the case is governed by the principle that the doctrine of exhaustion of state remedies embodied in 28 U. S. C. § 2254 does not bar resort to federal habeas corpus if the petitioner has obtained a decision on his constitutional claims from the highest court of the State, even though, as here, that court could have based its decision on another ground. *Wade v. Mayo*, 334 U. S. 672. In this view, we do not reach the question whether federal habeas corpus would have been available to the petitioner had the Indiana Supreme Court rested its decision on the escape ground.

The judgment of the Court of Appeals is reversed and the case is remanded to that court. The Court of Appeals may decide the merits of petitioner's constitutional claim, or remand to the District Court for further consideration of that claim, as the Court of Appeals may determine.

It is so ordered.

MR. JUSTICE STEWART concurs in the judgment and the opinion of the Court, with the understanding that the Court does not here depart from the principles announced in *Brown v. Allen*, 344 U. S. 443.

SUPREME COURT OF THE UNITED STATES

No 63.—OCTOBER TERM, 1958.

Leslie Irvin, Petitioner,	} On Writ of Certiorari	
v.		to the United States
Alfred F. Dowd, Warden of the Indiana State Prison.		Court of Appeals for the Seventh Circuit.

[May 4, 1959.]

MR. JUSTICE FRANKFURTER, dissenting.

The problem represented by this case is as old as the Union and will persist as long as our society remains a constitutional federalism. It concerns the relation of the United States and the Courts of the United States to the States and the Courts of the States. The federal judiciary has no power to sit in judgment upon a determination of a state court unless it is found that it must rest on disposition of a claim under federal law. This is so whether a state adjudication comes directly under review in this Court or reaches us by way of the limited

*The formulation by Mr. Chief Justice Fuller, for the Court, of this jurisdictional *sine qua non* in *California Powder Works v. Davis*, 151 U. S. 389, 393, represents the undeviating practice of the Court until today:

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented."

scope of habeas corpus jurisdiction originating in a District Court. (Judicial power is not so restrictively distributed in other federalisms comparable to ours. Neither the Canadian Supreme Court nor the Australian High Court is restricted to reviewing Dominion and Commonwealth issues respectively. The former reviews decisions of provincial courts, turning exclusively on provincial law and the latter may review state decisions resting exclusively on state law.) To such an extent is it beyond our power to review state adjudications turning on state law that even in the high tide of nationalism following the Civil War, this Court felt compelled to restrict itself to review of federal questions, in cases coming from state courts, by limiting broadly phrased legislation that seemingly gave this Court power to review all questions, state and federal, in cases jurisdictionally before it. It refused to impute to Congress such a "radical and hazardous change of a policy vital in its essential nature to the independence of the State courts" *Murdock v. Memphis*, 20 Wall. 590, 630. This decision has not unjustifiably been called one of "the twin pillars" (the other is *Martin v. Hunter's Lessee*, 1 Wheat. 304) on which have been built "the main lines of demarcation between the authority of the state legal systems and that of the federal system." Hart, *The Relations Between State and Federal Law*, 54 Col. L. Rev. 489, 503-504.

Something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut, on the assumption that this Court has general discretion to see justice done. Nor is it one of those "technical" matters that laymen, with more confidence than understanding of our constitutional system, so often disdain.

In view of so vital a limitation on our jurisdiction, this Court has, until relatively recently, been very strict on insisting on an affirmative showing on the record, when review is here sought, that it clearly appear that the judgment complained of rested on the construction of federal law and was not supportable on a rule of local law beyond our power to question. Particularly in cases where life or liberty are at stake, the Court has relaxed this insistence to the extent of giving state courts an opportunity to clarify a decision that could fairly be said to be obscure or ambiguous in establishing that it rested or could rest on an interpretation of state law. No doubt this procedure makes for delay in ultimate decision. But it ensures that there is no denial of the right to resort to this Court for the vindication of a federal right when a state court's adjudication leaves fair ground for doubt whether a federal right controlled the issue. Experience shows that this procedure for clarification at times establishes that it was, in fact, federal law on which the state decision rested, while in other instances the state court removed all doubt that state law supported its decision, and there was an end of the matter. Compare *Whitney v. California*, 274 U. S. 357, and *Herb v. Pitcairn*, 324 U. S. 117, 325 U. S. 77, with *State Tax Comm'n v. Van Cott*, 306 U. S. 511, and *Van Cott v. State Tax Comm'n*, 98 Utah 264; *Minnesota v. National Tea Co.*, 309 U. S. 551, and *National Tea Co. v. State*, 208 Minn. 607; *Williams v. Georgia*, 349 U. S. 375, and *Williams v. State*, 211 Ga. 763.

Even the most benign or latitudinarian attitude in reading state court opinions precludes today's decision. It is not questioned that the Indiana Supreme Court discussed two issues, one indisputably a rule of local law and the other a claim under the Fourteenth Amendment. That court discussed the claim under the Fourteenth Amendment rather summarily, after it had dealt

extensively with the problem of local law. If the Indiana court's opinion had stopped with its lengthy discussion of the local law and had not gone on to consider the federal issue, prefacing its consideration with the introductory sentence that "[o]ur decision on the point under examination makes it unnecessary for us to consider the other contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in this case. . . ." (*Irvin v. State*, 236 Ind. 384, 392-293), it is inconceivable that, on the proceeding before us, we would entertain jurisdiction. What this Court is therefore saying, in effect, is that it interprets the discussion of the Fourteenth Amendment problem which follows the elaborate and potentially conclusive discussion of the state issue not as resting the case on two grounds, state and federal, but as a total abandonment of the state ground, a legal erasing of the seven-page discussion of state law. Concededly, if a state court rests a decision on both an adequate state ground and a federal ground, this Court is without jurisdiction to review the superfluous federal ground. For while state courts are subject to the Supremacy Clause of the United States Constitution (Art. VI, § 2), they are so subject only if that Clause becomes operative, and they need not pass on a federal issue if a relevant rule of state law can dispose of the litigation.

It may be that it is the unwritten practice of the Indiana Supreme Court to have an "unnecessary" consideration of a federal issue wipe out or displace a prior full discussion of a controlling state ground. Maybe so. But it is surely not a self-evident proposition that discussion of a federal claim constitutes abandonment of a prior disposition of a case on a relevant and conclusive state ground. The frequency with which state court opinions indulge in the superfluity of dealing with a federal issue,

after resting a case on a state ground, affords abundant proof that we cannot take judicial notice of an inference that a federal question discussion following a state-ground disposition spells abandonment of the later. Perhaps if counsel had documented such an Indiana practice, had supplied us with a basis for drawing that conclusion regarding the appropriate way of reading Indiana opinions, this Court itself would be entitled to find that such is the way in which Indiana decisions must be read. But we cannot extemporize the existence of such an Indiana practice as a basis for our jurisdiction. Restricted, as we are restricted, to the text of what the Supreme Court of Indiana wrote in 236 Ind. 384, in ascertaining what it is that the Indiana Supreme Court meant to do when it first enlarged upon a controlling state ground and then, *ex gratia*, dealt with an "unnecessary" federal ground, we are not free to pluck from the air an undocumented state practice on the strength of which we are to ignore the bulk of the state court's opinion and treat it as though it had not been written or its significance had been discredited by the Indiana Supreme Court.

In the most compassionate mood, all we are entitled to do in a case like this, where life is at stake, is to afford an opportunity for the Indiana Supreme Court to tell us whether, in fact, it abandoned its state ground and rested its decision solely on the "unnecessary" federal ground. Thus only could this Court acquire jurisdiction over the federal question. Such a remission to the Indiana Supreme Court, by an appropriate procedure, for a clarification of its intention in writing this double-barreled opinion would be in full accord with the series of cases in which the state court was given opportunity to clarify its purpose. To assume, as the Court does, that the Indiana Supreme Court threw into the discard an elaborately considered local law rule is, I most respectfully submit, to assume a jurisdiction that we do not have. This assumption of

jurisdiction cannot help but call to mind the admonition of Benjamin R. Curtis, one of the notable members in the Court's history, that "questions of jurisdiction were questions of power as between the United States and the several States." 2 Cliff. 614 (1st Cir.).

With due regard to the limits of our jurisdiction there is only one other mode of reading the opinion of the Indiana Supreme Court, one other mode, that is, by which the meaning of its opinion is to be decided by that court and not this. That is the mode which my brother HARLAN has explicated, and it is entirely consistent with the governing considerations which I have tried to set forth for me also to join, as I do join, his dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 63.—OCTOBER TERM, 1958.

Leslie Irvin, Petitioner,	} On Writ of Certiorari
Alfred F. Dowd, Warden of the Indiana State Prison.	
	to the United States Court of Appeals for the Seventh Circuit.

[May 4, 1959.]

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK, and MR. JUSTICE WHITTAKER join, dissenting.

Although I agree that federal consideration of petitioner's constitutional claims is not foreclosed by the decision of the Supreme Court of Indiana, I think that the Court's disposition of the matter, which contemplates the overturning of petitioner's conviction without the necessity of further proceedings in the state courts if his constitutional contentions are ultimately federally sustained, rests upon an impermissible interpretation of the opinion of the State Supreme Court (236 Ind. 384), and that a different procedural course is required if state and federal concerns in this situation are to be kept in proper balance.

It is clear that the federal courts would be without jurisdiction to consider petitioner's constitutional claims on habeas corpus if the Supreme Court of Indiana rejected those claims because, irrespective of their possible merit, they were not presented to it in compliance with the State's "adequate and easily complied with method of appeal." *Brown v. Allen*, 344 U. S. 443, 485. The first question that concerns us, therefore, is whether the state court's judgment affirming the conviction rests independently on such a state ground.

At the outset we must keep in mind several aspects of Indiana criminal procedure, and the manner in which petitioner's attorneys presented his appeal to the Indiana Supreme Court, all as noted in this Court's opinion. The procedural aspects are (1) that no appeal lies from an order denying a new trial as such, that kind of an order being reviewable only in connection with an appeal from the final judgment in the case; (2) an escapee, such as this petitioner was, has no standing to make a motion for a new trial, at least if he is at large throughout the period available for the making of such a motion, 236 Ind., at 386-392; and (3) an appellant must perfect his appeal by filing assignments of error and a transcript of the record. In the taking of petitioner's appeal from the judgment of conviction the *only* assignment of error filed related to the trial court's denial of the motion for a new trial. While that assignment was supported by a detailed specification of petitioner's constitutional claims, none of such claims was independently filed as an assignment of error.

Had the State Supreme Court declined without more to reach petitioner's constitutional contentions because (1) his motion for a new trial had been forfeited by reason of escape, and (2) such claims had not independently been assigned as error, the federal courts would not, as has been said, be entitled to consider them. The difficulty here is that the state court did not stop at this juncture, but, after pointing out that petitioner had assigned as error only the denial of his motion for a new trial and holding that such denial was not error because of petitioner's escape, went on to consider and find without merit petitioner's constitutional claims.

This Court infers from the fact that the Indiana court considered petitioner's constitutional contentions that its affirmance of his conviction rested entirely on the denial of those claims. It reads the state court's opinion as say-

ing that although that court could under state law properly rest its affirmance of the conviction on petitioner's failure to assign as error anything but the denial of his motion for a new trial, which, as we have seen, was held to have been properly denied under the State's "escapee" rule, it would not do so but would treat petitioner's constitutional claims as if they had themselves been presented as assignments of error, rather than only as grounds supporting the error assigned to the trial court's order denying a new trial. I think this reading of the state court's opinion defies its plain language.

The state court devotes no less than seven pages of its nine-page opinion to an exhaustive discussion of the rule of state law which requires denial of a new trial motion made by an escapee still at large. At the close of this discussion it says:

"The action upon which the appellant predicates error in this appeal is based solely upon the overruling of a motion for a new trial. There is no other error claimed. Since appellant had no standing in court at the time he filed a motion for a new trial the situation is the same as if no motion for a new trial had been filed, or he had voluntarily permitted the time to expire for such filing. His letter reveals he was aware of this right, and had talked with his attorneys about a new trial and an appeal.

"No error could have been committed in overruling the motion for a new trial under the circumstances.

"Our decision on the point under examination makes it unnecessary for us to consider the other contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in this case. . . . 236 Ind. at 392-393.

The opinion then reviews the petitioner's constitutional contentions, and concludes with the statement:

"It does not appear from the record and argument had, that the appellant was denied due process of law under the Fourteenth Amendment, or due course of law under the Bill of Rights, or that there was any miscarriage of justice when he was convicted and given the death penalty." *Id.*, 394.

This Court's reading of the Indiana opinion makes the exhaustive discussion in that opinion of the status of an escapee under Indiana law entirely unnecessary and meaningless. While I agree with the Court that the Indiana Supreme Court reached a "considered conclusion that the conviction resulting in the death sentence was not obtained in disregard of the protections secured to the petitioner by the Constitution of the United States," it is fully apparent that the state court ultimately rested its judgment of affirmance squarely on the ground that the petitioner's *sole* assignment of error, the denial of his motion for a new trial, was without merit because he was an escapee when that motion was made, and when it was denied. The fact that the Indiana court also reached a conclusion that petitioner's claims of constitutional deprivation were not made out does not entitle us to ignore the fact that it was on a point of state procedure that it ultimately rested.

Nevertheless, I do not think that in the circumstances of this case the State's contention that the federal courts lack jurisdiction to deal with petitioner's constitutional points can be accepted. The State has conceded that its Supreme Court was empowered in its discretion to disregard the procedural defects in petitioner's appeal. That being so, the state court's constitutional discussion takes on, for me, a vital significance in connection with its procedural holding under state law, namely, that affirmance

of petitioner's conviction was rested on this state ground only *after* the Indiana court, displaying a meticulous concern that state procedural requirements should not be allowed to work a "miscarriage of justice," particularly in view of "the finality of the sentence," had satisfied itself that petitioner's constitutional contentions were untenable. Such a reading of the state court's opinion is required to give meaning to its constitutional discussion, for if petitioner's procedural failures inexorably prevented the state appellate court from reaching his constitutional claims their discussion in its opinion would appear to have been wholly pointless. At the same time this view of the opinion deprives Indiana's procedural holding of vitality as a bar to consideration of petitioner's constitutional claims by the federal courts on habeas corpus, for the decision as to those claims was inextricably a part of that holding. I therefore think that the two courts below should have dealt with the merits of petitioner's constitutional points.

However, even were the federal courts ultimately to hold that petitioner was denied due process, it would not be within their province thereupon to order his release. At that point it would unmistakably be the prerogative of the Indiana Supreme Court to decide whether on different postulates of federal constitutional law it would nevertheless hold that under Indiana law petitioner would still be barred from being heard because of his failure to comply with the State's procedural rules. For just as it is the federal courts' responsibility and duty finally to decide the federal questions presented in this case, it belongs to the Indiana Supreme Court finally to decide the state questions presented in the light of federal decision as to the commands of the Fourteenth Amendment. Hence if petitioner ultimately prevails on his constitutional claims, further proceedings in the state courts will be unavoidable.

In this state of affairs I think our proper course should be to proceed ourselves to a decision of the constitutional issues, rather than remand the case to the Court of Appeals. If the judgment of the Indiana Supreme Court is potentially going to be called into question because of a federal court's conclusion that it is based in part on erroneous constitutional postulates, I believe that Indiana is entitled to have that conclusion authoritatively pronounced by this Court. Moreover, the District Court, and one judge of the Court of Appeals, have already given clear (and conflicting) statements of their views as to the merits of such issues. The questions have been exhaustively briefed and fully argued before us. And this course would avoid further protracted delay.

Were we to conclude that the Indiana Supreme Court was correct in its premise that petitioner's constitutional points are without merit, the judgment of the Court of Appeals dismissing the writ of habeas corpus should of course be affirmed. If, on the other hand, we should decide that petitioner was in fact deprived of due process at trial, I would hold the case and give petitioner a reasonable opportunity to seek, through such avenues as may be open to him, a determination by the Indiana Supreme Court as to whether, in light of such a decision, it would nevertheless hold that petitioner's failure to comply with the State's procedural rules required affirmance of his conviction. Cf. *Patterson v. Alabama*, 294 U. S. 600; *Williams v. Georgia*, 349 U. S. 375. Should no such avenues be open to petitioner in Indiana, it would then be time enough to decide what final disposition should be made of this case.

For these reasons I concur in the view that federal consideration of petitioner's constitutional claims is not precluded, and in all other respects dissent from the Court's opinion.

No. 63, October Term, 1958

LESLIE IRVIN, PETITIONER

vs.

ALFRED F. DOWD, WARDEN OF INDIANA STATE PRISON.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Seventh Circuit, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for proceedings in conformity with the opinion of this Court.

May 4, 1959

Clerk's \$150

The above amount to be paid directly to the Clerk of the Supreme Court of the United States, Washington 25, D.C.

Mr. Justice Stewart concurs in the judgment and the opinion of this Court, with the understanding that the Court does not here depart from the principles announced in *Brown v. Allen*, 344 U.S. 443.

Dissenting opinion by Mr. Justice Frankfurter.

Dissenting opinion by Mr. Justice Harlan with whom Mr. Justice Frankfurter, Mr. Justice Clark, and Mr. Justice Whittaker join.

A true copy

Test: JAMES R. BROWNING, Clerk of the Supreme Court of the United States.

Certified this ninth day of June, 1959.

By: (s) R. J. BLANCHARD,

Deputy.

(Endorsed: Filed June 11, 1959. Kenneth J. Carrick, Clerk.)

No. 12080

LESLIE IRVIN, PETITIONER-APPELLANT

vs.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION.

Order retaining jurisdiction—October 21, 1959

Before Hon. F. RYAN DUFFY, *Circuit Judge*; Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*; Hon. LATHAM CASTLE, *Circuit Judge*.

It appearing (1) that the judgment of this court entered in the above-entitled cause, on January 29, 1958, was, on May 4, 1959, reversed by judgment of the Supreme Court of the United States and this cause was thereby remanded to this court for proceedings in conformity with the opinion of the Supreme Court of the United States filed on May 4, 1959; (2) that the judgment of this court was heretofore entered following the consideration of briefs and oral arguments of counsel for the respective parties; and (3) that, since the filing in this court on June 11, 1959 of a certified copy of the judgment of the Supreme Court of the United States reversing and remanding said cause as aforesaid, this court has carefully examined and considered the entire record and files of the proceedings in the United States District Court for the Northern District of Indiana, South Bend Division, which include a complete transcript of all proceedings affecting petitioner in the circuit courts of Vanderburgh County and Gibson County, Indiana, respectively, as well as the briefs heretofore filed herein by counsel for both sides, and this court having considered the aforesaid opinion of the United States Supreme Court, as well as the accompanying opinions written

by Mr. Justice Stewart, Mr. Justice Frankfurter and Mr. Justice Harlan, it is hereby determined by this court that the merits of the federal constitutional claim of petitioner-appellant be decided by this court and that this case be not remanded to the District Court for further consideration of that claim.

And the court, being fully advised in the premises, *It is hereby ordered* that this cause be and it is hereby taken under advisement by this court without further oral argument.

40 IN THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

NO. 12080

SEPTEMBER TERM, 1959 SEPTEMBER SESSION, 1959

LESLIE IRVIN, PETITIONER-APPELLANT

v.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE

ORIGINALLY DECIDED ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA,
SOUTH BEND DIVISION; NOW ON REMANDMENT FROM THE
UNITED STATES SUPREME COURT

Opinion—October 23, 1959

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges*.
SCHNACKENBERG, *Circuit Judge*. We heretofore, *Irvin v. Dowd*, 251 F. 2d 548, affirmed an order of the district court dismissing a petition for writ of habeas corpus filed by petitioner, who is also referred to herein as "defendant".¹ Subsequently our judgment was reversed and this case was remanded to this court, 359 U.S. 394. The federal Supreme Court held, at 405, that the state Supreme Court decided

¹For the opinion of the district court, see 153 F. Supp. 531.

petitioner's federal constitutional claim. In remanding, at 407, the court left it to us to decide the merits of that claim or to remand to the district court for further 41 consideration thereof. We have determined to decide the merits of that claim.

As stated in his brief, defendant's constitutional claim of denial of due process of law is based principally upon his allegations of bias and prejudice in the community where his trial occurred and a preconceived opinion of the trial jurors that defendant was guilty.

As the Supreme Court said, 359 U.S., at 396:

" * * * Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized, stating that the petitioner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner, counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue."

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1. It cannot be denied that it was the duty of the state of Indiana to apprehend and punish the person who perpetrated the aforesaid murders. Upon a state there rests no more sacred duty than the protection of the lives of its citizens from criminal attack. At the same time the state owes a duty to any person charged with such crimes to afford him a fair trial as required by the federal constitution. What is a fair trial depends upon the circumstances existing at and prior to the trial. An accused's right to a fair trial is coexistent with the right of law-abiding citizens to lawful protection by their government. It is not surprising that, the more extensive the news coverage of a crime and the more wanton and unjustified the crime itself, the greater and more extensive is the indignation of citizens. Such indignation, varying in its degree according to the violence of the crime, and geographically extensive with the area of news distribution, undoubtedly causes many people to form impressions or beliefs as to the guilt or innocence of suspected or indicted persons. In these days of widely effective and thorough news distributing instrumentalities, such as the telephone, newspaper, radio and television, as well as rapid travel of persons by automobiles, trains and airplanes, hardly a person anywhere in a state, or in fact in the United States, is long ignorant of the details of crimes committed in any state (or in this country), unless he be completely mentally incompetent or is in solitary confinement in a jail. In fact, it may well be that into the latter place the grapevine reaches. We no longer live in a day when what happened in the next county was learned only by conversation with a traveling man or a brakeman on the way freight train. It is into this modern society with facilities for quick and broad news coverage that a person who commits six murders projects himself. When apprehended, he is entitled to a fair trial and is to be accorded due process of law, according to the existing circumstances.

Our problem in its last analysis is whether the general resentment of a people following the publication by news distributing media of information in regard to a series of murders may be relied upon to prevent the state from prosecuting a person indicted for these crimes, even though his trial be held before

an unbiased judge and a jury is selected in accordance with established principles applicable to such a case. If the state is so prevented from trying such a person, it means that the commission within a state of a multiplicity of criminal acts, followed by the usual publicity, actually immunizes the offender from prosecution. We reject such a conclusion as the law of this circuit.

There was undoubtedly a prejudice against the person or persons who committed the series of murders, including that of Whitney Leslie Kerr on December 23, 1954 for which defendant was indicted. It was publicly announced that defendant had confessed that killing and five other murders.

There is no contention by defendant that the alleged bias and prejudice in the community affected the judge and interfered with his presiding as a fair jurist or that perjured evidence was produced against defendant at the trial. It is only in the jury box that counsel for defendant professes to find some effect of community prejudice damaging to defendant. It is true that some jurors, when questioned on their *voir dire*, admitted a preconceived opinion that he was guilty. History shows that this is not an unprecedented situation. Accordingly it has been met by the law. Usually there is a pertinent statute, such as that in effect in Indiana, § 9-1504 Burns Indiana Statutes, Annotated, which reads:

Challenges for cause.—The following shall be good causes for challenge to any person called as a juror in any criminal trial:

Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction,

or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case.

44 The record reveals that the trial judge applied this act in this case. With painstaking care, the court, in asking questions of jurors expressing an opinion as to the guilt or innocence of defendant, founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, required each such juror to state on oath whether he felt able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence. Several of those who answered in the affirmative were accepted upon the trial jury. Defendant now seeks to have us determine, as a matter of federal constitutional law, that this action by the trial court deprived defendant of a fair trial.

We have no right to question the intelligence, the truthfulness or the sincerity of these jurors, whose impartiality to render a verdict upon the law and the evidence was, after examination, determined to the trial judge's satisfaction, in the manner provided by the Indiana act.

A careful reading of the entire record convinces us that the jury which tried defendant was properly qualified as a fair and impartial fact-finding body.

In *Reynolds v. United States*, 98 U.S. 145, 155, the court said:

"* * * The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It

is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. . . ."

In *Hopt v. Utah*, 120 U.S. 430, 434, a juror who formed a qualified opinion based upon newspaper accounts, testified that he could try the case according to the evidence given in court. The Supreme Court held that the judgment of the trial court that the juror was competent was conclusive.

In *Holt v. United States*, 218 U.S. 245, 248, the court said:

"* * * The finding of the trial court upon the strength of the juror's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest * * *"

While our conclusion suffices to dispose of the point now under consideration, we note the existence in New York of a statute dealing with a juror "who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *". *People v. Buchalter*, 45 N.E. 2d 225, 245, 289 N.Y. 181. When the case reached the United States Supreme Court, *Buchalter v. New York*, 319 U.S. 427, the court said, at 430:

"The petitioners assert that, in view of unfair and lurid newspaper publicity, it was impossible to obtain an impartial jury in the county of trial, and that the rulings of the court denying a change of venue, and on challenges to prospective jurors, resulted in the impanelling of a jury affected with bias. We have examined the record and are unable, as the court below

was to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established. Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury, *such assertion raises no due process question* requiring review by this court." (Italics supplied.)

2. During his trial defendant made several motions for continuance based upon what he described as bias and
46 prejudice against him in the community. These motions were denied and he insists that such action violated due process of law. He reasons that "it is difficult to predict what would have happened had this cause been continued until a later date", and "it is difficult to say whether it would have been again necessary for Petitioner-Appellant to have sought an additional continuance, or whether, at that time, the bias and prejudice against Petitioner-Appellant would have subsided."

When these motions were made the trial was under way, the *voir dire* examinations having been commenced on November 14, 1955. This was almost 11 months after the crime had been committed on December 23, 1954, and 8 months after defendant was arrested and made his confession, which had been publicized at the time in Vanderburgh county. It seems to us that there is no more reason to believe that further delay would then have allowed public opinion to subside than that such delay would have incurred greater public feeling aroused by the slowness of the judicial process. In any event the presentation of these motions for continuance required a careful exercise of discretion by the trial judge. His denial of the motions was the exercise of a discretion which will not be disturbed by a reviewing court, in the absence of an abuse thereof. This is recognized by the case which is relied upon by defendant in his brief, *Liese v. State*, 233 Ind. 250, 254, 118 N.E. 2d 731. There was no abuse of discretion by the trial judge in this respect.

3. A change of venue was granted to defendant from Vanderburgh county to Gibson county by authority of § 9-1305, Burns Indiana Statutes, Annotated, which reads:

When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases punishable by death, shall grant a change of venue to the most convenient county. * * * Provided, however, That only one [1] change of venue from the judge and only one [1] change from the county shall be granted.

Defendant repeatedly and unsuccessfully in the Gibson County Circuit Court sought a change of venue from Gibson county.

47 For the first time, defendant, in his brief filed in this court on appeal from the district court, raises a question as to the constitutionality of this change of venue statute, limiting defendant to but one county change of venue. We might well dispose of this point upon the ground that he had not raised it in the court below. We shall, however, consider the validity of this challenge.

It is significant that defendant cites no federal court decision to sustain his *ipse dixit* contention that the act violates the federal constitution. We have found none.

Various states have similar statutes forbidding county changes of venue after a case has been once removed to another county by change of venue. The United States Supreme Court has denied certiorari to review convictions occurring in the county to which a change of venue was granted, but from which a second change of venue was denied. *Patterson v. State* (Ala.) (rape), 175 So. 371, cert. denied 302 U.S. 733, and *State v. Morgan* (La.) (murder), 84 So. 589, cert. denied 253 U.S. 498. To the same effect, see *People v. Doss* (Ill.) (criminal contempt), 46 N.E. 2d 984, cert. denied 320 U.S. 762, reh. den. 320 U.S. 813, app. dism. *Doss v. Lindsley*, 325 U.S. 835.

We hold § 9-1305 not unconstitutional, as charged.

4. Defendant contends that he challenged certain jurors for cause and made offers, which were overruled, to prove that they

were biased against him, and he was thus prevented from having a fair trial. However, the record shows that the jurors to whom he refers, Hensley, Montgomery and Higginbotham, were fully examined in open court and that defense counsel participated in interrogating these persons.

If it be assumed *arguendo* that, in a situation such as this, where a prospective juror is subjected to interrogation as to his qualifications by counsel for both sides in a criminal case, an offer to prove that he is disqualified can properly be made by defense counsel, the fact remains that the offers appearing in this record are insufficient in that they state mere conclusions without disclosing the alleged facts upon which the conclusions are based. *Malone v. State* (Ind.), 96 N.E. 1, 2.

48 We find no violation of defendant's federal constitutional rights in respect to the rejection by the trial court of these offers.

5. Defendant also urges that the trial court refused to permit him to introduce evidence in an effort to establish an illegal arrest, unlawful detention and involuntary nature of resultant purported confession, which refusal denied him due process of law. We find that the record actually does not show that the court refused permission to defendant to introduce evidence in this respect. Counsel have seized upon a few words at the end of a lengthy objection made by the defense to a question put on December 16, 1955 to a police officer, who was a state witness, asking what defendant told the witness about the murder of Kerr on April 12, 1955. The jury was then present. This objection was very lengthy and the latter part embodied a statement of facts, concluding with the words "all of which the defendant now asks leave of court to prove and introduce evidence to prove the same." The court said, "Objection overruled". Actually defendant had on December 14, 1955, introduced evidence on this point at a preliminary hearing out of the presence of the jury, to support his objection to the introduction of his confession. At that time the court overruled defendant's objection. The trial on December 16, 1955 thereupon proceeded before the jury, during which the state witnesses were cross-examined by defense counsel. Moreover, defendant in the trial before the jury undoubtedly had a right

to introduce evidence bearing upon the question of the voluntary nature of his confession. However he offered none. Obviously there is no substance to defendant's contention that he was refused permission to introduce evidence to establish the alleged involuntary nature of his confession.

6. However, relying upon the record, defendant claims that his conviction, based upon a confession obtained by state officers through the use of force, duress and intimidation and while he was being held contrary to Indiana law, violates due process. There was a lengthy trial in the Gibson County Circuit Court. The record now before us shows that the trial was conducted by a judge possessing seemingly inexhaustible patience and exercising meticulous regard for the rights of defendant.

We have examined this record carefully and we are convinced of the correctness of the statement made by the Indiana Supreme Court in *Irvin v. State*, 236 Ind. 384, 393, 139 N.E. 2d 898, 902:

"* * * The record reveals, as well as the argument before this court, that appellant had unusually competent counsel furnished at public expense. He was loyally and expertly defended, at every point in the case. Four hundred and fifteen specifications of alleged error are presented in the motion for new trial.

"The contention that the evidence was insufficient to support the verdict is not one of the items. A review of the evidence shows it to be both convincing and credible. Appellant was identified as the last person seen with the victim while alive. That occurred just a few minutes prior to the discovery of the killing. When the state rested appellant offered no evidence in defense. He made a confession. There is nothing to substantiate any claim it was forced or made under fear. Instead it seems appellant made it freely; motivated by a desire to avoid being tried in the state of Kentucky where he was wanted for other charges of multiple murder. It was the appellant who asked for an interview with the prosecuting attorney, Mr. Wever, who had not previously talked to him. Appellant asked if it would be enough if he confessed to the killing. Prosecutor Wever told

him, no, that he would have to have other facts to corroborate his admissions.

"Thereafter, in the company of the sheriff he pointed out the place where he threw the gun. A gun was discovered in a ditch at that point. During the time he was in jail, prior to the confessions he made, he was well-treated; permitted to sleep as desired, visited by friends and relatives, and a priest; told he could have an attorney, and was permitted to make telephone calls. He was permitted to order the kind of food he wanted, and on such occasions was served a menu better than that of the average prisoner, which included fried chicken, steak, and various kinds of special dishes.

50 "It is true the law enforcement officers questioned him at intervals, but this never lasted over an hour or two at any one time, and it did not interfere with any of his natural wants, including sleep. We find nothing to support the claim that the confession was coerced.

"Law enforcement officers should be commended, not condemned, for the attempts to identify and detect the persons who commit a crime, and this includes the arresting and questioning of suspects so long as the questioning is not done in an atmosphere of fear, threats, coercion and oppression. The obtaining of confessions from guilty persons is desirable, and is permissible in the public interest and welfare, so long as it is done under clearly proper circumstance, which appears to be the case here. A careful search of the record fails to show any contradiction of the confessions, and other evidence of his guilt.

"It does not appear from the record and argument had, that the appellant was denied due process of law under the Fourteenth Amendment, or due course of law under the Bill of Rights, or that there was any miscarriage of justice when he was convicted and given the death penalty."

7. Attorneys Wever and Sandusky, state prosecutors, handled the prosecution at the trial. Over objection of defense, Wever testified that he was informed that defendant

wanted to see him and hence he had a conversation with the defendant, which he related. He was cross-examined. The court instructed the jury that they were "the sole judges of the facts and credibility of the witnesses", and that they had a right to believe the witnesses they deemed most worthy of credit and disbelieve witnesses whom they believed least worthy of credit; that, in "determining whom you will believe you may consider the nature of the evidence given by them, their interest, bias or prejudice, if any disclosed; * * * and in weighing the testimony and determining the credibility of the witness, it is proper for you to take into consideration all the surrounding circumstances of the witnesses as brought out in the evidence, their interest, if any, in the result of the action, and such other facts appearing in the evidence as will, in your opinion, aid you in determining whom you will believe; * * *"

51 The testimony of Wever was cumulative to that of other state witnesses. For instance, he, as well as several police officers, testified about locating the gun, which defendant said he used in killing Kerr, at a place mentioned by defendant in the conversation with Wever. Wever made a closing argument.

Defendant contends that this conduct was unethical and that it violates due process. In a forum where the ethics of Wever's conduct is directly brought in issue by the state of Indiana, it is apparent that a charge of unethical conduct on the foregoing facts would be serious. However, in this case we cannot adjudicate a question of ethics. Certainly the testimony he gave was relevant to the case on trial, and he was a competent witness. As a factual matter the defense offered no evidence to contradict Wever's statement that the defendant wanted to see Wever. Hence it was not a case of the prosecutor seeking evidence by initiating a visit to the defendant. The jury heard a searching cross-examination of Wever by defense counsel and were then instructed by the court as to the right of the jury to consider the interest of a witness in the result of the case, in determining whom the jurors would believe. Therefore, in view of all these circumstances, it is entirely a matter of surmise whether Wever's

conduct had a harmful effect upon defendant in the minds of the jury. It is more reasonable to conclude that the jurors would react against the state in view of such conduct by its legal representative. However that may be, the most that can be said is that this conduct was error which did not have such a substantial effect upon the outcome as to strip the trial of due process. This conclusion finds support in *Burwell v. Teets*, 245 F. 2d 154, 168, 9 Cir., cert. denied 355 U.S. 896; *People v. Burwell* (Cal.), 279 P. 2d 744, 756, cert. denied 349 U.S. 936.

In *Darcy v. Handy*, 351 U.S. 454, 462, the court said:

52: "Petitioner has been given ample opportunity to prove that he has been denied due process of law. While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281. See also, *Buchalter v. New York*, 319 U.S. 427, 431; *Strobie v. California*, 343 U.S. 181, 198. Justice Holmes, speaking for a unanimous Court in *Holt v. United States*, 218 U.S. 245, 251, cautioned that 'If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.'"

8. As to the contention of defendant that the trial court denied him permission to have a court stenographer report the prosecutor's closing argument to the jury, it is settled practice in the courts of Indiana to not report verbatim closing arguments to juries, unless the trial court so directs. Evidently there was no discrimination against defendant in this respect. Even if there were, it appears that his counsel succeeded in having the trial judge incorporate into the record the precise language used by the prosecutor in his closing argument upon which defendant bases his contention that the prosecutor's con-

duct was unethical;² hence the error, if any, in refusing permission to report the entire argument was harmless.

In any event, even if error occurred in this respect, the due process clause of the Fourteenth Amendment does not enable us to review such error. *Buchalter v. New York*, 319 U.S. 427, 431.

For all of the foregoing reasons, we decide that defendant has not sustained his federal constitutional claim that he was convicted in violation of the Fourteenth Amendment. Accordingly, the judgment of the district court is affirmed and the stay of execution heretofore entered herein is vacated.

AFFIRMED AND STAY OF EXECUTION VACATED.

53 DUFFY, *Circuit Judge*, dissenting in part. I agree with that part of the majority opinion that Sec. 9-1305 Burns Indiana Statutes, Annotated—the change of venue statute—is not unconstitutional.

As to the offer of proof by defendant as to jurors Hensley, Johnson, Montgomery and Higginbotham, I agree with the statement in the majority opinion: "We find no violation of defendant's federal constitutional rights in respect to the rejection by the trial court of these offers."

However, I must respectfully dissent from that part of the majority opinion which holds that the defendant herein had a fair trial. It is well established that: "A fair trial in a fair tribunal is a basic requirement of due process. . . ." *In re Murchison, et al.*, 349 U.S. 133, 136. In my judgment defendant was not afforded due process of law in the trial which resulted in his conviction and upon which verdict the death sentence was imposed.

There is no dispute as to the fact that more than half of the jurors who sat in the case had preconceived ideas that defendant was guilty of the offense charged. Some of them testified on the *voir dire* that it would take evidence to change that opinion. Defendant had exhausted his twenty peremptory

² See 350 U.S. 394, at 399.

challenges. His several motions for continuances had been denied.

One of the most important rights of our citizens is the right to a public trial by a fair and impartial jury. The courts should be ever alert to preserve that right untarnished. *Baker v. Hudspeth*, 10 Cir., 129 F.2d 779, 781.

I am well aware that a brutal crime is almost certain to receive extensive news coverage by newspapers, radio and television. I realize that in the instant case a prolonged effort was made to obtain an impartial jury, but I am, nevertheless, forced to the conclusion that the jury, as finally constituted, was not impartial. Possibly it was as impartial a jury as could have been found in Gibson County on that date, but that was not sufficient. That did not insure due process.

When it became apparent that an impartial jury could not be obtained, the motion for a further continuance should
54 have been granted. The majority opinion argues that a further delay might not have been helpful, but, on the other hand, that public opinion might have been aroused by the slowness of the judicial process. The passage of time is a great healer. We have no right to speculate that any subsiding of public prejudice would be offset because our fundamental law insists that a defendant in a criminal case shall have a fair trial.

Another reason for the failure of due process in the instant case is that one of the two state prosecuting attorneys who tried the case also acted as a witness on the trial. The majority opinion, while conceding this was error, seems to brush it aside saying: "However, in this case we cannot adjudicate a question of ethics. . . ." Prosecutor Wever, participated in examining prospective jurors, interposed objections to testimony, and otherwise actively participated in the trial. He then took the stand as a witness and testified concerning a confession made to him. Over objection, he made the closing argument to the jury, commenting on the evidence including his own testimony. Such conduct was in violation of Canon 19 of the Canon of Professional Ethics. Such conduct was offensive to the rights of the defendant to a fair and impartial trial.

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LESLIE IRVIN VS. A. F. DOWD, WARDEN

55

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12080

LESLIE IRVIN, PETITIONER-APPELLANT,

vs.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION.

Judgment—October 23, 1959

Before Hon. F. RYAN DUFFY, *Circuit Judge*; Hon. ELMER J.
SCHNACKENBERG, *Circuit Judge*; Hon. LATHAM CASTLE, *Circuit
Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and upon remandment to this Court by the Supreme Court of the United States for proceedings in conformity with the opinion filed by the Supreme Court on May 4, 1959, and in accordance with the order heretofore entered by this Court on October 21, 1959.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, *affirmed*, in accordance with the opinion of this Court filed this day.

It is further ordered that, when this Court's mandate in this cause is hereafter issued herein, the stay of execution heretofore entered in this Court be vacated.

56

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Title omitted).

Order denying petition for rehearing—November 12, 1959

Before Hon. F. RYAN DUFFY, *Circuit Judge*; Hon. ELMER J.
SCHNACKENBERG, *Circuit Judge*; Hon. LATHAM CASTLE, *Circuit
Judge*.

It is hereby ordered by the Court that the petition for rehearing filed by appellant in the above entitled case, on remandment, be, and the same is hereby, denied; and

It is further ordered by the Court that appellant's request for oral argument on said petition for rehearing be, and the same is hereby, denied.

57 Clerk's Certificate to foregoing transcript omitted in printing.

58 SUPREME COURT OF THE UNITED STATES

No. 650 Misc.
OCTOBER TERM, 1959

LESLIE IRVIN, PETITIONER

VS.

A. F. DOWD, WARDEN

On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari—February 23, 1960

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 722.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

PETITION NOT PRINTED

Office-Supreme Court U.S.

FILED

SEP 24 1960

JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 41

LESLIE IRVIN,

Petitioner.

vs.

A. F. DOWD, Warden, Indiana State Prison,
Michigan City, Indiana,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF INDIANA

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 41

LESLIE IRVIN,

Petitioner,

vs.

**A. F. Dowd, Warden, Indiana State Prison,
Michigan City, Indiana,**

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF INDIANA**

PETITIONER'S BRIEF

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 271 F. 2d, p. 552 (7th Cir. 1959) the cause having been remanded by this Court at 359 U.S. 94, 79 S. Ct. 825, 3 L. Ed. 2d 909, with instructions to decide Petitioner-Appellant's cause on the merits, or remand same to the District Court for further consideration. On October 21, 1959, the United States Court of Appeals for the Seventh Circuit issued an order retaining jurisdiction (Tr. p. 38), and thereafter on October 23, 1959 decided the within cause on the merits adversely to this Petitioner (Tr. p. 39). Petition for a rehearing was denied on November 12, 1959 without written opinion (Tr. p. 54).

The opinion of the United States District Court for the Northern District of Indiana, South Bend Division, from which the original appeal was taken is reported in 153 F. Supp. 531.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered October 23, 1959 (Tr. p. 54). Petition for rehearing was denied on the 12th day of November, 1959 (Tr. pp. 54-55). The jurisdiction of this Court was invoked under the provisions of 28 U.S.C., Sec. 1254(1).

The writ of certiorari was granted by this Court to the United States Court of Appeals for the Seventh Circuit on the 23rd day of February, 1960 (Tr. p. 55).

Questions Presented

I.

Whether Petitioner was denied a fair and impartial trial as contemplated by the due process clause of the Fourteenth Amendment to the Constitution of the United States by being tried before a jury wherein more than half of the jury testified under oath on the voir dire examination that they had a preconceived opinion that the defendant was guilty of the crime charged, and it would require evidence to remove that opinion.

II.

Whether due process of law as contemplated by the Fourteenth Amendment to the Constitution of the United States was denied Petitioner by the trial court's refusal to consider on the merits a second change of venue based

upon bias, prejudice and excitement existing in the county wherein Petitioner was tried, for the sole reason that Petitioner had previously been granted a change of venue from another county, and the granting of the second change of venue would be in conflict with Burns Indiana Statutes Annotated, 1956 Replacement, Vol. 4, Part 1, Sec. 9-1305, p. 157.

III.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States by the trial court's action in denying a hearing on Petitioner's verified motions and affidavits for change of venue from the county wherein Petitioner was tried, based upon bias, prejudice and excitement then existing in the county, against the Petitioner.

IV.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in the overruling of motions for continuance of the trial, where bias, prejudice and excitement existed in the community and county at the time of said trial against Petitioner, as evidenced by newspaper articles, radio broadcasts, and the voir dire examination of prospective jurors.

V.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, by the trial court's action in denying a hearing on Petitioner's verified motions for continuance, based upon the bias, prejudice and excitement existing at the time of trial in the community and county, against this Petitioner.

VI.

Whether due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States was violated in permitting the introduction of a purported confession over Petitioner's objection, and without giving Petitioner an opportunity to introduce evidence, including his own testimony, in support of his objection and offer to prove the involuntary nature of same.

VII.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States by the actions of the prosecuting attorney, who participated in the selection of the jury, questioning of witnesses, testified himself as a witness, and who was then permitted, over Petitioner's objection, to make a final argument to the jury concerning the evidence, including comments on his own testimony.

VIII.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, by being denied the right to introduce evidence in support of challenges to certain jurors because of their bias and prejudice against the Petitioner, which bias and prejudice Petitioner offered to prove.

Constitutional Provisions and Statutes Involved

The pertinent constitutional provision is as follows, to-wit: ☛

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Fourteenth Amendment of the Constitution of the United States.*

The pertinent statutory provision is as follows, to-wit:

"When affidavits for a change of venue are founded upon excitement or prejudice in the county against defendant, the court, * * * and in all cases punishable by death, shall grant a change of venue to the most convenient county * * * provided, however, that only one (1) change of venue from the judge and one (1) change from the county shall be granted." *Burns Indiana Statutes Annotated, 1956 Replacement, Section 9-1305, Vol. 4, Part 1, p. 157.*

Statement

CHANGES OF VENUES

That on the 29th day of October, 1955, petitioner filed a verified motion and affidavit for change of venue from Gibson County, Indiana, Circuit Court, and requested a hearing thereon. Said motion and affidavit is found in Transcript page 62 Vol. 1 Petitioner's Exhibit No. 1, and reads as follows, omitting the captional parts and signatures thereon:

"The defendant, being first duly sworn, upon his oath says that he is the defendant in the above entitled cause; that he cannot have a fair and impartial trial thereof in the County of Gibson, State of Indiana, for the following reason:

That he verily believes that he cannot receive a fair and impartial trial of said cause in the Gibson Circuit Court, Gibson County, Indiana, owing to the excitement and prejudice in said county against this defendant.

The defendant further states, shows and represents that owing to the general excitement and prejudice of the inhabitants of Gibson County, Indiana, against this defendant he cannot have a fair and impartial trial of this cause for the following reasons, all of which the defendant now offers to prove and demand a hearing on the same to prove:

1. That commencing on the 2nd day of December, 1954, and up to and including the 28th day of March, 1955, there were six unsolved murders in and around Vanderburgh County, State of Indiana, and Gibson County, Indiana; that commencing with the 3rd day of December, 1954, up to and including this date, newspapers of Vanderburgh County and Gibson County, Indiana, have been circulating and publishing news stories of said murders; that said series of murders were unsolved and these newspapers devoted a large percentage of their front page news to stories concerning said murders and the extensive manhunt that accompanied the actions of law enforcement officers in their search for said murderer or murderers; that the failure of said police officers to solve said crime was in fact selected as a top news story for the year '54-'55; that as a direct result of said extensive newspaper coverage of these murders the residents of Gibson County were highly and greatly aroused; that the inhabitants of Gibson County and Vanderburgh County, during the period of time which said murders were committed, were greatly aroused and in fear of their own lives.

2. That this defendant was arrested on the 8th day of April, 1955; that said newspapers carried press releases from the Evansville Police Department, in whose custody this defendant was then and there, concerning this defendant's connection with said six murders in Evansville and surrounding areas and that this affiant had confessed to the six murders in the Evansville area; that said press releases were given to the newspapers out of the presence of this defendant; that said releases were unsworn to and never seen by this defendant; that at no time was he or his counsel given the opportunity to cross-examine those who released such statements to the newspapers and radio stations in Evansville, Indiana; that at no time has this defendant been given the opportunity by the press to deny or contradict said press releases; that said press releases are untrue.

3. That the press release accusing this defendant of committing said murders was jointly given by the Prosecutor of Vanderburgh County, Indiana, and the Chief of Detectives of the City of Evansville, Indiana; that numerous other releases were given from time to time by the Prosecutor and Police Department stating that this defendant was attempting to make a deal with them to plead guilty for a sentence of life, rather than face trial and a possible penalty of death; that the Prosecutor announced to the public of Vanderburgh County and Gibson County, Indiana, that he would make no compromise and would ask the death penalty; that he had confessed to the commission of the six murders; that the details of said confession were released as a purported statement from this defendant to the members of the press and radio, when in fact this defendant made no such statement.

4. The defendant further states that the newspapers of Vanderburgh and Gibson Counties, Indiana, carried news items stating that this defendant had been found sane and was adjudged sane, whereas in truth and in fact, there had been no plea of insanity on the part of the defendant in this matter, nor has this defendant been found sane or insane by this court, or any other court.

5. That since the 13th day of April, 1955, these Evansville papers and the Gibson County newspapers have continuously carried stories concerning said defendant and referring to this defendant as the 'confessed killer of six,' and that said stories have been continuous up to and including this date.

6. That in addition, each time this defendant has gone to court said newspapers have carried front-page stories concerning the court room action; that the Evansville Courier printed a cartoon depicting a change of venue taken by this defendant in the Vanderburgh Circuit Court to the Gibson Circuit Court as taking the 'dirty wash' from Vanderburgh County to Gibson County; that another cartoon depicted the court room scene at the time of the hearing of defendant's motion to remand.

7. That said newspapers, the same being the Evansville Courier, Evansville Press, and the two daily newspapers of Gibson County, are delivered to approximately 95 percent of the dwelling units of Gibson County, Indiana; that said papers have carried stories and news items concerning this defendant and his responsibility for said murders.

8. That in addition thereto, the radio stations of Evansville, Indiana, carried extensive news broadcasts

and bulletins covering the same and similar material as released by the Evansville Courier and Evansville Press; that said radio stations have extensive and complete coverage of Gibson County, Indiana.

9. That because of said newspaper publications and radio coverage the inhabitants of Gibson County have become highly prejudiced and there is now excitement against this defendant among said inhabitants of Gibson County; that Gibson County is a small agricultural community, having a population of approximately thirty thousand people; that the trial of this cause in said Gibson County has become the talk and general conversation of the community; that radio curbstone opinions have been taken of the inhabitants of Gibson County, as to the guilt or innocence of this defendant and the punishment to be given or imposed; that the minds of the inhabitants of Gibson County and the people throughout the same are excited, biased and prejudiced against the defendant; that the press of said county has been engaged in publishing articles relative to this defendant which have been or are being read by the citizens generally of Gibson County, greatly tending to affect the minds of the citizens against this defendant; that by reason of the foregoing facts, all of which the defendant offers to prove to this court, it is impossible for this defendant to be given a fair and impartial trial in Gibson County; that to place this defendant on trial before the inhabitants of Gibson County would deny this defendant due process of law under the Fourteenth Amendment of the United States Constitution and of his constitutional rights under Article 1, Section 13, of the Constitution of the State of Indiana.

10. The defendant further alleges and says that attached hereto, incorporated herewith are Exhibits 1

to 46 inclusive; that same are some of the newspaper items that have been published by the newspapers of Vanderburgh County, Indiana, against this defendant, and distributed throughout Gibson County; that the same are highly prejudicial to this defendant's cause; that said newspaper items set out in said exhibits have been circulated generally through said Gibson County and to its said thirty thousand inhabitants.

WHEREFORE, the defendant prays a hearing to introduce evidence in support of his motion for change of venue from Gibson County, Indiana, and to further show to this Court that the newspaper and radio publicity given this cause has caused the Gibson County inhabitants to be excited and prejudiced against this defendant, and that this cause be venued to a county where no excitement and prejudice exists against this defendant and for all other necessary and proper relief in the premises."

Said motion and affidavit was denied without a hearing by the trial court. The Order Book Entry is found at page 57 of the Transcript, Vol. 1, Petitioner's Exhibit No. 1, which reads in part, as follows:

"And now the defendant files his motion and affidavit for change of venue from the county, and the court having judicial knowledge that this case is in this court on a change of venue from the Vanderburgh Circuit Court, granted on the petition of the defendant, all as shown by the transcript in this cause, now overrules said motion and affidavit for change of venue from Gibson County, Indiana, * * *"

That thereafter petitioner filed another change of venue from Gibson County, State of Indiana on the 14th day of

November, 1955, requesting a hearing thereon. Said motion and affidavit reading as follows, omitting the captional parts and signatures thereof and found in Petitioner's Exhibit No. 1, Vol. 1, page 148, to-wit:

"The defendant being first duly sworn upon his oath says, that he is the defendant in the above entitled cause; that he cannot have a fair and impartial trial thereof in the county of Gibson, State of Indiana, for the following reason:

That he verily believes that he cannot receive a fair and impartial trial of said cause in the Gibson Circuit Court, Gibson County, Indiana, owing to the excitement and prejudice in said county against this defendant.

WHEREFORE, the defendant demands a change of venue from the County of Gibson, State of Indiana, and demands a hearing upon same to prove that owing to the excitement and prejudice in said County against the defendant, said defendant cannot have a fair and impartial trial thereof in this County."

Order Book Entry denying hearing on said motion for change of venue reads as follows:

"* * * and comes now the defendant and files an affidavit and motion for change of venue from Gibson County, and the Court being duly advised in the premises overrules said affidavit and motion of said defendant, from Gibson County, since the defendant has had one change of venue from the county as allowed him by the statute of the State of Indiana, and that it is in this court on a change of venue from the Vanderburgh Circuit Court" (Tr. p. 127, L. 27 to Tr. p. 128, L. 24).

That thereafter Petitioner filed another change of venue from Gibson County, State of Indiana on the 7th day of December, 1955, requesting a hearing thereon. Said motion and affidavit reading as follows; omitting the captional parts and signatures thereof, and found in Petitioner's Exhibit No. 1, Vol. 1, page 297, to-wit:

"The defendant, Leslie Irvin, being duly sworn upon his oath says that he is the defendant in the above entitled cause; that he cannot have a fair and impartial trial thereof in the County of Gibson, State of Indiana, for the following reasons:

1.

That he verily believes that he cannot receive a fair and impartial trial of said cause in the Gibson Circuit Court, Gibson County, State of Indiana, owing to the excitement and prejudice in said county against this defendant, and further for the reason that the members of the jury as now constituted have expressed and formed an opinion to this court that the defendant is guilty of the crime charged, and that said jurors are biased and prejudiced against this defendant, and cannot give this defendant a fair and impartial trial as guarantee by the laws of the State of Indiana, the Constitution of the State of Indiana, and the Constitution of the United States.

2.

Defendant further states that in the voir dire examination of 355 jurors called in this case to qualify as jurors, 233 have expressed and formed their opinion as stated in said voir dire that the defendant is guilty; that said expressions by said members of the voir dire is a fair and reasonable representation of the citizens

of Gibson County expressing themselves that the defendant is guilty of the crime charged, and that they are biased and prejudiced against this defendant, and that they cannot give the defendant a fair and impartial trial, and they further stated on said voir dire that they could not be guided by the law and evidence in reaching a verdict, but would be influenced by their fixed opinions of guilt they now have against this defendant, and that said fixed opinions entertained by said members of the voir-dire are based upon and as a result of intensive newspaper stories about this defendant.

3.

That the excitability and hostile nature of opinions of the citizens of Gibson County is further evidenced by exclamations that 'they ought to hang him'; said exclamations having been made by prospective jurors on the voir dire in this cause, and in the presence of the jurors now occupying the jury box.

WHEREFORE, the defendant demands a change of venue from Gibson County, State of Indiana, and requests and prays a hearing upon this motion and affidavit, and offers to prove the above and foregoing allegations to be true, and that owing to the excitement and prejudice in said county of Gibson against this defendant, said defendant cannot have a fair and impartial trial thereof in this county."

Order Book Entry overruling said motion (Tr. p. 284).

CONTINUANCES

That during the course of the trial, the petitioner filed verified motions and affidavits for continuances, and particularly on the 14th day of November, 1955, petitioner

filed a verified motion and affidavit for a continuance of the trial of his cause in the Gibson Circuit Court and requested a hearing on said continuance. Said Court denied said continuance and denied the petitioner a hearing on said continuance. That said motion and affidavit for continuance, omitting the captional parts and signatures thereof reads as follows, to-wit: And is found in Petitioner's Exhibit No. 1, Vol. 1, page 130:

"The defendant, Leslie Irvin, for his verified motion and affidavit for a continuance of this cause and for a hearing on this motion to continue, alleges and says:

1. That there is excitement and prejudice against this defendant in Gibson County, Indiana.

2. That the newspapers, radio and television stations of Vanderburgh County and Gibson County, Indiana, both having complete coverage and circulation of Gibson County, Indiana, have persisted in publishing false and untrue stories, false statements and accusations against this defendant, classifying, describing and charging him as the 'confessed killer of six persons'; that said newspapers and radio broadcasts and publications have continuously been printed since April, 1955, and these stories and radio broadcasts have been circulated and broadcast to the citizens of Gibson County, Indiana; that as a result of said radio broadcasts and newspaper publications the citizens of Gibson County, Indiana, are excited, prejudiced, biased and hostile toward this defendant.

3. That said newspaper publications and radio broadcasts are prejudicial to this defendant's rights to a fair and impartial trial; that it is impossible for this defendant to have a fair and impartial trial with

the present biased, prejudiced, and hostile feeling against this defendant now existing in Gibson County, Indiana.

4. That attached hereto, marked Exhibits 1 to 7, are newspaper articles printed by the Evansville Courier and the Princeton Clarion-Democrat; that said newspapers have been extensively circulated in Gibson County, Indiana; that said newspapers reached approximately ninety-five (95) percent of the dwelling homes in said Gibson County, Indiana, that said newspaper articles have been distributed to the homes and dwelling units of the members of the jury panel called by the court for the trial of this cause; that said prospective jurors, consisting of a special venire of 201 inhabitants of Gibson County, Indiana, in addition to the 20 members of the regular panel, have read and discussed the stories printed in said newspapers set out in said exhibits; that said newspaper articles have prejudiced said prospective jurors' minds against this defendant; and that the attached exhibits are only some of the false and untrue statements that have been published about this defendant since April, 1955; that said newspapers have persistently published articles and stories concerning this defendant; that said stories are factual and are inflammatory, accusatory and condemning of this defendant; that said publications suggest that the defendant is guilty of the crime charged, as well as five other murders; that said newspapers have tried the case in the newspapers before the action has begun in the courts and as a result of their publication as facts, without any basis therefor, jurors called in this cause have determined that this defendant is guilty.

5. Deponent further states that exhibits numbered 1, 2 and 3 are newspaper articles that have appeared

in publications delivered within the last thirty-six hours to the inhabitants and prospective jurors of Gibson County, Indiana.

6. That to place this defendant on trial in Gibson County, Indiana, with said excitement, bias, prejudice and hostility now existing in Gibson County, Indiana, against this defendant, would deprive this defendant of his constitutional rights under Article 1, Section 12, of the Constitution of the State of Indiana, and under Article 1, Section 13, of the Constitution of the State of Indiana, and the 14th Amendment to the Constitution of the United States.

7. The defendant requests the court to take judicial knowledge of the exhibits and affidavit for change of venue heretofore filed in this cause. The defendant incorporates said newspaper articles, by reference, as a part of this affidavit and motion, for a continuance.

WHEREFORE, the defendant prays for a continuance of this cause until such time as said bias, prejudice and hostile excitement is permitted to settle, or that this defendant be granted a change of venue from Gibson County, Indiana, to a county wherein bias and prejudice does not exist and the defendant further prays a hearing on this motion to introduce evidence in support thereof, and for all other necessary and proper relief in the premises."

Additional verified motions for continuances were filed on November 15, 1955, Tr. p. 155, Petitioner's Exhibit No. 1; on November 16, 1955, Tr. p. 162, Petitioner's Exhibit No. 1; on November 17, 1955, Tr. p. 171, Petitioner's Exhibit No. 1; on November 18, 1955, Tr. p. 179, Petitioner's Exhibit No. 1; on November 21, 1955, Tr. p. 187, Petitioner's Exhibit No. 1; on November 22, 1955, Tr. p. 201, Petitioner's Exhibit No. 1; on

December 5, 1955, Tr. p. 243, Petitioner's Exhibit No. 1; each of said motions were overruled as shown by the record in Transcript pages 127, 154, 161, 170, 178, 186, 200 and 242.

During the voir dire examination of jurors, Paul B. Wever, Prosecuting Attorney for the State of Indiana in this cause appeared on Radio Station WJPS in Evansville, Indiana, for an interview with an announcer of said station. This interview took place during the second week of the voir dire examination, and is found in Exhibit 1, Volume 1, Tr. pp. 253-254, and is part of a motion for continuance filed by Petitioner on December 5, 1955. The verbatim transcript of this broadcast reads as follows:

"We are going to talk for a couple of minutes with Mr. Paul Wever, who is conducting the prosecution against Leslie Irvin * * * who is charged with the murder of Wesley Kerr in the Gibson Circuit Court * * *

Ralph Smith: Mr. Wever, this has been a rather unusual case, in that it has taken quite a while to qualify a jury, is that right?

Paul Wever: Yes, very unusual—it has taken longer to qualify this jury than any case in history of Vanderburgh or Gibson County.

Ralph Smith: For goodness sake—now in cases in the past how long have they usually—how long did it take in the Spurlock case: Has this case taken longer?

Paul Wever: Yes, that took approximately one week and this has been over a week and we are not even close to getting a jury yet.

Ralph Smith: Are there any other unusual * * * well are there any other unusual aspects—we are not going to ask you knowing you have the case under trial * * * we are only interested in the side-lights of the case.

Paul Wever: I think probably the most unusual thing in this case is *the unusual coverage given to the case by the newspapers and radio. This is what has caused us so much trouble in getting a jury of people who are not unbiased and unprejudiced in the case.*

Ralph Smith: You mean the coverage of the thing that has gone before the actual trial?

Paul Wever: That is right. Of course, that is natural—it is an unusual and very bizarre case and it got a lot of * * * and publicity.

Ralph Smith: And the publicity attached to this case has made it difficult to begin trying it?

Paul Wever: Very.

Ralph Smith: When do you think you will have a jury or can you say at all?

Paul Wever: Well, this is an off-hand opinion, but from my experience I would say it would take at least another week.

Ralph Smith: Another week?

Paul Wever: Yes.

Ralph Smith: And will that set a record for this sort of thing?

Paul Wever: Undoubtedly, yes."

Said broadcast was made during the course of the trial to the inhabitants of said Gibson County.

JURORS

On the 14th day of November, 1955 the selection of a jury was commenced and prospective jurors were examined by both parties. That at the end of four weeks of voir dire examination the Petitioner herein had exhausted all 20 of his peremptory challenges and had challenged all 12 prospective jurors then seated in the jury box. These

were for cause, based upon bias and prejudice against the Petitioner. That a number of said selected jurors testified under oath during said voir dire examination that they had formed and expressed an opinion that the defendant was guilty of the particular crime charged, and some stated they would require evidence to remove said opinion. One selected juror admitted that he could not be fair and impartial. The following are excerpts of testimony of jurors who served on petitioner's jury, made during their voir dire examination.

JUROR—ERNEST HENSLEY:

Q. Is that based upon reading the newspapers?

A. Yes, sir.

Q. And what newspaper do you subscribe to?

A. The Evansville Courier and the Princeton paper.

Q. And you have read news articles about the defendant in the Evansville Courier?

A. Yes, sir.

Q. And you discussed the matter with your wife, is that right?

A. Oh, yes.

Q. Your friends and family?

A. Yes, sir.

Q. Business associates (Tr. p. 3656)?

A. Yes, sir.

Q. Fellow employees?

A. Yes, sir.

Q. And, as a result of the same, you have formed and expressed an opinion as to the defendant's guilt or innocence, is that right?

A. Well, yes, sir.

Q. Has that opinion become more or less a fixed opinion in your mind?

A. No, it's no fixed opinion.

Q. It's no fixed opinion?

A. No fixed opinion.

Q. To set aside this opinion, would it require any evidence?

A. Oh, yes, it would require evidence to set it aside.

Q. It would require some evidence?

A. Yes.

Q. So you think that that would require evidence from the defendant then?

A. Evidence direct from the defendant.

Q. Or from somebody on his behalf?

A. Somebody on his behalf, yes, I think so.

Q. Before you could set this opinion of yours aside, and if there wasn't any evidence from the defendant, this opinion of yours would carry with you throughout the trial, is that right?

A. If there wasn't any evidence?

Q. Yes.

A. Yes, I think it would.

Q. Do you think you can set this opinion aside without any evidence?

A. Absolutely.

Q. What?

A. Oh, not without any evidence, no.

Q. Not without any evidence?

A. No.

Q. You just couldn't do it, could you?

A. That's right, sir.

Q. This opinion of yours is so well fixed and formed in your mind that you could not lay it aside without evidence?

A. That's right.

Q. Now you understand the law to be that the defendant ordinarily in a criminal case is presumed to be innocent?

A. Yes.

Q. Until proven guilty. Now, in this particular case, because of this opinion of yours, would you presume the defendant to be guilty?

A. Well, I would until I heard evidence otherwise.

Q. You would until you heard some other evidence of his innocence, wouldn't you?

A. That's right.

Q. Then you would presume, then, starting out on this trial, that the defendant was guilty until you heard evidence from him or from someone on his behalf of his innocence?

A. Yes, sir.

Q. There is another principle of law that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt—you are familiar with that law?

A. Yes.

Q. In this particular case, you would have a reasonable (Tr. p. 3658) doubt as to the defendant's innocence, wouldn't you?

A. Right now, I would.

Q. And that would require evidence to set that doubt aside?

A. Yes, sir.

Q. So, in this particular case, you could not enter into this matter and give the defendant the benefit of the doubt that he is innocent?

A. That's right.

Q. And, under those circumstances, it would be rather impracticable for you to render a fair and impartial verdict based solely upon the evidence?

A. That's right.

Mr. Lopp: Defendant challenges the juror for cause, the cause being he could not render an impar-

tial verdict based solely upon the evidence and he has a fixed opinion that would require evidence to remove it.

By Mr. McGregor:

Q. Mr. Hensley, could you as a juror disregard this opinion—this present opinion—that you now have and keep it from interfering with your verdict in any way?

A. Oh, yes.

Q. I mean, your opinion could be disregarded by you?

A. Only by evidence.

Q. Only by evidence?

A. That's right, sir.

Q. Well, supposing that your opinion was not removed; supposing that you still had it when you went in the jury room? Would you then decide your verdict and render a verdict according to your opinion or according to (Tr. p. 3659) the evidence as presented here in court?

A. According to the evidence, altogether.

Q. That's what I'm getting at. If you were chosen as a juror, Mr. Hensley, it would be your duty and responsibility to decide this case solely and entirely on the law and the evidence as presented here in court?

A. That's right.

Q. You can hear me all right?

A. Yes.

Q. You're not hard of hearing?

A. I am the least bit.

Q. Do you think you could hear the evidence from the witness chair as they testified, then?

A. There would be some doubt.

Q. Have you had any trouble with your hearing?

A. Well, slightly. I'm slightly deaf.

Q. In both ears?

A. No, it's in my left ear.

Q. Can you hear me all right?

A. I can hear you all right.

Q. Again, if you were chosen as a juror, it would be your duty to decide this case solely and entirely on the law and the evidence presented in court, is that right?

A. That's right.

Q. Now, you would do that if chosen as a juror?

A. I would.

Q. Now, what if there wasn't any evidence that would change your opinion? Of course, you would still have it.

A. I would still have it if there wasn't no evidence to change it (Tr. p. 3600).

Q. Let me ask you this—you understand it is the duty of the State of Indiana to prove the man guilty beyond any reasonable doubt?

A. Yes, sir.

Q. You have always heard that a man is innocent until proven guilty?

A. I sure have, yes, sir.

Q. What if you sit on this jury and until the State of Indiana does prove him guilty beyond a reasonable doubt by evidence here in the court room, would you be giving him the benefit of that law which claims that a man is innocent until proven guilty?

A. Yes, I would.

Q. All right, until the State of Indiana proves him guilty, then, beyond any reasonable doubt, would you in your own mind be giving him the benefit of innocence and the presumption of innocence?

A. Yes, if you don't prove him guilty—yes, sir.

Q. And would he be entitled, in your mind, before the State of Indiana proved him guilty beyond a reasonable doubt to an acquittal?

A. Yes, if he wasn't proven, I would, yes.

Q. In other words, he would be entitled in your mind at all times to an acquittal until the State of Indiana proved him guilty beyond any reasonable doubt, is that right?

A. Yes, sir, that's right, sir.

Q. I believe you told Mr. Lopp that it would take some evidence from the defendant to remove this opinion that you now have?

A. Well, it would, but I don't believe it's strong enough (Tr. p. 3661), in my mind to convict any man. The evidence would have to convict him.

Q. In other words, even though that might be true that it would take evidence to remove it from your mind, you could disregard it and it would not influence your verdict, is that what you mean?

A. That's right, yes, sir.

Q. You say you do not have a strong opinion—do you mean that you just have some sort of a suspicion or impression?

A. Well, just what I read, and that's the only thing I know.

Q. You would not consider that a strong opinion?

A. That's right.

Q. In other words, your mind is still open to the reception of evidence, is that right?

A. That's right.

Q. This opinion that you have is not such that it has closed your mind to the reception of evidence?

A. No.

Q. Still have an open mind?

A. That's right.

Q. You understand that under our law, when a defendant is charged with the crime, he enters into the beginning of the trial presumed to be innocent. He

has the advantage of that legal presumption of innocence.

A. Yes, that's true.

Q. And you have always heard that?

A. Yes, sir.

Q. Do you believe in that law?

A. Yes, I do (Tr. p. 3662).

Q. Now, if you are chosen as a juror, then you, as a juror, give him the benefit of that legal presumption of innocence at the beginning of the trial?

A. At the beginning of the trial?

Q. Yes, and make the State of Indiana prove him guilty before you would—

A. Oh, yes, he would have to be proven guilty.

Q. He would have to be proven guilty before you would return a verdict of guilty?

A. That's right.

Q. Well, then, you would be giving him the benefit of that legal presumption of innocence at the beginning of the trial, wouldn't you?

A. Yes.

Q. Even though you do have that opinion that you now have, you would still make the State of Indiana prove him guilty beyond any reasonable doubt before he would be found guilty?

A. That's right. That's what I want to make the point, because it's not strong enough in my mind but what the evidence would change it. It's not strong enough in my mind to convict him.

Q. What if it should happen that you would listen to the evidence and you were not convinced beyond a reasonable doubt of his guilt from the evidence here?

A. I couldn't convict no man here unless I clearly knew he was guilty.

Q. From the evidence in court?

A. From the evidence.

Q. In court (Tr. p. 3663) †

A. That's right.

Q. Not information you received outside?

A. That's not evidence, no.

Q. That's not evidence?

A. That's not evidence, no.

Q. And you would not consider what you received outside at all, would you?

A. No, sir.

Q. Now, Mr. Hensley, you've read about certain things connected with this case?

A. Oh, yes, I've read quite a bit.

Q. And at this time you don't know whether they are true or not?

A. No, I don't, no, sir.

Q. Until those matters are presented here in evidence in court, would you consider them in any way in your deliberations in your verdict?

A. How was that?

Q. Until those matters that you have read about have been presented as evidence here in court, would you consider them in any way in your deliberations?

A. Not in the least.

Q. No doubt in your mind about that, is there, Mr. Hensley?

A. No doubt about that. It would have to be evidence.

Q. In other words, you believe you could be fair?

A. Yes, I couldn't be anything else but fair.

Q. You understand that under our law, a defendant is never required to testify in his own behalf, never forced to, nobody can force him to, you understand that?

A. I understand that, yes (Tr. p. 3663½).

Q. And if he does not, it is the law that you, as a

juror, are not to consider that fact any evidence against him—do you believe in that law?

A. Well, I guess I have to believe in that.

Q. Would you follow that law?

A. Yes, I would follow it.

Q. You would follow that law?

A. Oh, yes.

Q. I think it is further the law that if he does not take the stand that you, as a juror, are not to comment upon that fact. Would you follow that law if you were chosen as a juror?

A. I would.

Q. And suppose that there was no evidence at all on behalf of the defendant, Mr. Hensley, would that fact force you, if there was no evidence at all from the defendant, would that fact alone force you to vote guilty, no matter whether the State failed to prove him guilty beyond any reasonable doubt, or not?

A. No.

Q. In other words, you would decide your verdict entirely and solely on the law and the evidence?

A. Altogether.

Q. And would he be entitled in your mind to an acquittal at all times during this trial unless the State of Indiana proved him guilty beyond any reasonable doubt?

A. Yes, yes, he would.

Q. And you tell me that even though you do have this opinion in your mind?

A. That's right, yes, sir (Tr. p. 3664).

Q. In other words, you could set aside your present opinion?

A. Yes, sir.

Q. And keep it from influencing your verdict in any respect?

A. Yes, sir.

Q. And if you were chosen as a juror, you would render an impartial verdict.

A. Yes, sir.

Q. Based entirely and solely on the law and evidence as presented herein in court?

A. Yes, sir.

Q. Do you think you could be fair?

A. Yes, sir.

Q. Are you sure that you could be fair?

A. I am sure.

Q. Are you so sure of it that you would be willing for him to sit there on the jury in your place and you be the defendant, if you knew that he had in his mind the same thoughts, the same attitudes, the same opinions as you now have about him?

A. I don't get that.

Q. All right, you say that you could be fair, is that right?

A. That's right.

Q. Supposing that he, the defendant, were sitting up there in the jury box instead of you and you were sitting down there as the defendant, would you be willing for him to sit on your jury if you knew that he had in his mind the same thoughts, the same opinions, and the same attitudes toward you as you have toward him?

A. Yes, I would.

Q. You would be willing for him to do that (Tr. p. 3665)?

A. Yes, I would.

Q. Now, you tell me that if all you are looking for, if all you would be looking for, would be a fair trial, is that right?

A. That's right.

Q. Now, of course, if you were a defendant, you

would rather have your friends sitting on the jury, wouldn't you?

A. Oh, yes.

Q. You would rather, wouldn't you, but if all you were looking for was a fair trial, that would be all right with you for him to sit on your jury?

A. Yes, sir.

Q. If he had the same ideas about you as you have about him?

A. Yes, sir.

Q. Is there any doubt in your mind about that?

A. No doubt whatever.

Q. Where do you live?

A. I live about three miles southwest of Princeton.

Q. And what's your business?

A. Farming.

Q. You're a farmer, and how old are you?

A. I am sixty years old.

Q. Do you own your own farm there?

A. Yes, sir.

Q. And how many acres do you farm?

A. I farm about 235 acres, that is, me and the boy together. I have a son.

Q. And most of that acreage is in cultivation, is that right (Tr. p. 3666)?

A. Yes.

Q. How long have you lived there and farmed that farm?

A. I have lived where I live now about eleven years.

Q. You've been a farmer all your life, is that right?

A. Yes, sir (Tr. p. 3667).

By Mr. Lopp:

Q. Now, Mr. Hensley, your first name is what?

A. Ernest.

Q. Mr. Ernest Hensley, I think you told us that you have expressed an opinion as to the defendant's guilt or innocence, haven't you?

A. That's right.

Q. And that's from reading the newspapers?

A. Yes.

Q. Listening to the radio?

A. I don't know about the radio. I don't listen to the radio too much. I have a television. I don't pay too much attention to the radio.

Q. Discussing it with your neighbors?

A. Oh, yes.

Q. And your friends and relatives and associates. This opinion that you have formed and expressed as to the defendant's guilt was based upon what you read and heard?

A. Altogether, yes, sir.

Q. Altogether what you read and heard?

A. That's right.

Q. This opinion was expressed and formed by you shortly after the defendant was arrested, or when was it?

A. No, I guess it was formed as I went along (Tr. p. 3834).

Q. As time went along?

A. I think so.

Q. When you came in here as a juror, you still continued to have that opinion?

A. Yes, that's right.

Q. And whether or not this opinion that you formed and expressed as to the defendant was that he was guilty of this particular crime charged?

A. Just in my own mind.

Q. That's right, and that opinion you also formed and expressed an opinion that the defendant confessed to this particular crime?

A. Well, I don't know whether I said that or not, but I understand from the papers that he did.

Q. You have the opinion that he did confess to the crimes?

A. That's right.

Q. You have the opinion, that he confessed to other crimes?

A. I believe so.

Q. And you have an opinion, that the defendant shot, killed and murdered Kerr, isn't that right?

A. Yes, sir, that's right.

Q. And you have formed the opinion that the defendant shot, killed and murdered Kerr while the defendant was perpetrating a robbery?

A. Yes, that's right.

Q. Have you formed any opinion as to the fixing of the penalty in this case?

A. I don't know as I did. I just formed that as I went along.

Q. But you haven't formed any opinion as to the fixing of (Tr. p. 3835) the penalty, is that right, sir?

A. That's right (Tr. p. 3836).

JUROR—FRANK ROBINSON (Tr. p. 2496 L. 9 to Tr. p. 2500 L. 13):

Q. Have you read or heard news stories about this defendant?

A. I have.

Q. What period of time have you heard those stories, Mr. Robinson?

A. Oh, six months, probably, or longer. I don't know exactly.

Q. Sure, and you read the headlines?

A. I have.

Q. The by-lines?

A. Yes, sir.

Q. Saw pictures?

A. Yes, sir.

Q. Talked to your neighbors about this matter?

A. Yes, sir.

Q. Talked to the people in your community?

A. Yes, sir.

Q. Been doing that for the last six months, haven't you?

A. Off and on. I would say part of the time. Off and on I would say I have.

Q. As a result of that you have reached an opinion as to the guilt or innocence of this defendant, haven't you?

A. Well, I haven't formed an opinion. I expressed my (Tr. p. 2496) opinion—I would say it that way.

Q. You have expressed your opinion as to his guilt or innocence?

A. That's right.

Q. Have you formed an opinion?

A. No, sir.

Q. But you expressed an opinion?

A. That's right.


Q. By forming an opinion, what you do mean—you haven't reached any conclusion as to his guilt or innocence?

A. That's correct.

Q. But you have expressed yourself as to whether he is guilty or innocent, haven't you?

A. That's right.

Q. That's just a little hard for me to understand. I wish you would explain that to me. How you could express yourself as to his guilt or innocence but yet not form an opinion?



A. Well, probably I don't know the meaning of the two.

Q. Maybe I don't understand you. Would you try to explain that to me?

A. Well, the way I figure, if a fellow forms an opinion, he is strong in it, but I'm not that way. I expressed my opinion as to how it could be and this and that, but as far as making up my mind, I haven't.

Q. You have formed an opinion but your opinion isn't strong, is that what you mean?

A. That's right.

Q. In other words, you have formed an opinion in order that you can express it, but you say your opinion is not (Tr. p. 2497) strong?

A. That's right.

Q. Now, you have expressed that opinion to several people, have you?

A. No, not necessarily. With my wife mostly, I would say.

Q. Some of the menfolks?

A. Yes.

Q. General talk in the neighborhood?

A. That's right.

Q. And that expression and opinion that you have formed has been for how long?

A. I would say four or five months, something like that. I don't know exactly, as far as that goes.

Q. Do you know of anything right now that would change this opinion that you have formed or expressed? Right now do you know of anything that would change that opinion that you now have formed or expressed as to his guilt or innocence?

A. I don't just exactly get you on that.

Q. Is there anything as of now that would change this opinion that you have formed and expressed as to the defendant's guilt or innocence?

A. No, not at the present.

Q. At the present time you don't know of anything that would change that opinion?

A. Not at the present time.

Q. Would it require some evidence to change this opinion that you have formed or expressed?

A. Yes.

Q. Now, that evidence would have to come either from the defendant or the State of Indiana, is that right?

A. That's right.

Q. And if the defendant did not produce some evidence, you would retain your opinion of guilt or innocence, wouldn't you?

A. That's right.

Q. Then it would require evidence on the part of this defendant to change your opinion, wouldn't it?

A. That's right.

Q. And if there wasn't any evidence, your opinion would carry with you throughout the trial, wouldn't it?

A. Well, I would go by the evidence.

Q. Sure, you would go by the evidence.

A. I don't think the fellow—how is that? I forget how to say that.

Q. A fellow is guilty until he is proven that way?

A. That's right.

Q. What we're getting at right now is that you have read these newspaper headlines, talked to your neighbors, the gentlemen there in your community, and, as a result of the same, you have reached a conclusion. You have expressed and formed an opinion, haven't you?

A. That's right.

Q. And that is as to his guilt or innocence?

A. That's right.

Q. And you are going to retain that opinion that you have formed and expressed, aren't you?

A. That's right.

Q. Unless either the defendant or the State produces evidence to change that opinion?

A. That's right.

Q. That you have formed and expressed?

A. That's right.

Q. As to the defendant's guilt or innocence, is that right?

A. That's right.

Q. Then, in answer to my question, it would require evidence on the part of the defendant to remove that opinion that you have expressed and formed against this defendant as to his guilt or innocence, wouldn't it?

A. Yes, sir.

Q. And that opinion would stick with you until that was removed by evidence?

A. That's right.

CONTINUATION OF FRANK ROBINSON (Tr. p. 3888 L. 15 to Tr. p. 3890 L. 21):

Q. Mr. Robinson, if I recall, at one time you did express the opinion here that the defendant was guilty.

A. I said I expressed my opinion, but I hadn't formed one.

Q. You expressed that opinion that the defendant was guilty?

A. That's right.

Q. And that he committed the particular crime charged?

A. That's right.

Q. You expressed, also, an opinion that the defendant had confessed to this particular crime.

A. I don't believe I have. I don't remember even reading that he confessed. In fact, I learned more sitting here than I remembered about what I read in the paper.

Q. Did you read about other crimes the defendant was alleged to have committed?

A. Well, I suppose I have. I think I told you (Tr. p. 3888).

Q. Did you form an opinion as to whether or not he was guilty of those crimes?

A. No.

Mr. Sandusky: To which we object and move the answer be stricken as not relevant to the case being tried.

The Court: Objection overruled.

Q. Whether or not, Mr. Robinson, you have formed an opinion that the defendant shot, killed and murdered the deceased Kerr?

A. Yes, I have expressed myself, like I said.

Q. Are you of the same opinion that the defendant here is one and the same person that committed the crimes in Kentucky that you read about?

Mr. Sandusky: To which we object for the reason that the defendant is not being tried for crimes committed in Kentucky but is being tried for murder while in the perpetration of a robbery of one Whitney Wesley Kerr.

The Court: Objection sustained.

Mr. Lopp: The defendant at this time challenges the juror for cause, the cause being that the said juror has shown by his answers that he has fixed and settled opinions as to the guilt of the defendant

as to most of the facts and circumstances necessarily relied upon by the State of Indiana for a conviction; that said juror could not be an impartial juror as required by Article (Tr. p. 3889) 1; Section 13 of the Indiana Constitution of the State of Indiana, and that said defendant would be denied his rights under the 14th Amendment of the Federal Constitution of the United States, which is the due process clause; for said juror to be permitted to sit as juror; that said expression of the defendant's guilt, as testified to by said juror, would necessarily be biased and prejudiced against this defendant and said juror would now be impliedly and would be biased and prejudiced against this defendant.

By the Court:

Q. Mr. Robinson, I believe on several occasions you have told the lawyers on both sides of the case and told me that regardless of any opinion you might have once had as to the guilt or innocence of this defendant, that you could and would lay that opinion aside and decide this case solely and impartially upon the law and the evidence introduced in this court room.

A. I have.

Q. And that's the way you feel about it now?

A. I certainly do.

The Court: Show that the challenge is overruled.

Mr. Lopp: To which the defendant excepts (Tr. p. 3890).

JUROR—DONALD HIGGINBOTHAM (Tr. p. 2150 L. 20 to Tr. 2159 L. 13):

A. We have discussed it at home.

Q. Your neighbors?

A. Yes, sir.

Q. Did you discuss it with anybody there in Owensville?

A. Well, not that I know of.

Q. Well, was it generally discussed in the community where you live?

A. Quite a bit, yes.

Q. Did you see your name in the newspaper, too, being called as a prospective juror?

A. Yes, sir (Tr. p. 2150).

Q. Has anybody talked to you about it?

A. Oh, some, yes.

Q. What did they about it?

A. All they said was called for petit jury.

Q. Do what?

A. I just seen my name in the paper where I would be called for petit jury.

Q. Have you formed or expressed any opinion as to the guilt or innocence of this defendant?

A. Yes, sir.

Q. And that opinion is based upon the newspaper?

A. Yes, sir.

Q. Talking to other people?

A. Yes, sir.

Q. And how long have you had this opinion, approximately?

A. Well, when they first arrested him.

Q. That's been several months, is that right?

A. Yes.

Q. Have you had anything to change that opinion that you entertained?

A. Not yet.

Q. What?

A. Not yet, no.

Q. Would it require evidence on the part of this defendant or any of his witnesses to change that fixed opinion that you have?

A. They would have to prove it.

Q. Who would have to prove it?

A. Well, their evidence.

Q. No, maybe you misunderstood. You have an opinion (Tr. p. 2151) don't you, as to the guilt or innocence of this defendant?

A. Yes, sir.

Q. And you reached that opinion by reading the newspapers, haven't you?

A. And radio.

Q. And talking to people, haven't you?

A. Yes, sir.

Q. And made up your mind one way or the other as to the guilt or innocence of this defendant, haven't you?

A. Yes, sir.

Q. For you to change that opinion that you entertain, would it require evidence on the part of this defendant?

A. Not the defendant alone, no. They would have to prove, the evidence would have to prove that he wasn't.

Q. Maybe I misunderstood. If you were selected as a juror, you would start out on this case with this opinion you have now, wouldn't you?

A. Yes, sir.

Q. And at this time you don't know of anything that would change your opinion, do you?

A. Well, I have to hear the case first.

Q. Sure, you would. But you would carry with you this opinion that you now have as to the guilt or innocence, wouldn't you?

A. Until it was proved.

Q. What?

A. Until I had reasons to believe different.

Q. Well, you already have your mind made up (Tr. p. 2152).

A. No, not thoroughly.

Q. You have an opinion.

A. I have an opinion, yes.

Q. And would you carry that opinion with you?

A. No, I would try to listen to the facts and what's told in court—the law.

Q. Now, if the court instructed you that the defendant did not have to testify in his own behalf and that fact could not be used against him—

A. Yes, sir.

Q. Would you follow that law?

A. I would try to.

Q. Or would you require this defendant to testify or give some evidence in his own behalf?

A. Well, I don't know. I think if you have a fixed opinion it should be proven otherwise before you could prove it's not that way.

Q. Could you explain to me just a little bit better?

A. Well, I think if you've got your mind made up that you should be changed before you would be different. I think that.

Q. In other words, you would require the defendant to come forward with some evidence?

A. No, I would require some evidence from some place.

Q. What if the evidence would be the same as what your opinion is right now, would you require this defendant to come forward with some evidence to remove that opinion?

A. No, not necessarily. I would have to have some evidence, though, from somebody to change my opinion (Tr. p. 2153).

Q. Well, that would have to be from the defendant, wouldn't it?

A. No, not exactly.

Q. Or from some of his witnesses, if any?

A. That's right, some of the witnesses.

Q. And if there is no witnesses, then you would convict the defendant?

A. Well, he would have to be proved guilty before I would accept it, yes. The State would have to prove to me he was guilty before I would vote for him guilty.

Q. All right, let's say the State produced evidence that he is guilty and there is some evidence, let's say.

A. Yes, sir.

Q. But that evidence would not be conclusive?

A. I don't know what you mean.

Q. Well, it wouldn't be conclusive to you to have follow it, or to prove that he was guilty beyond a reasonable doubt..

A. They would have to prove beyond a reasonable doubt before I would convict him, yes.

Q. They would have to prove he is guilty beyond a reasonable doubt?

A. Yes, sir.

Q. Let's say their evidence would be that—there would be evidence that he was guilty and then there's equally evidence that he is not guilty and your mind would be divided—would you require the defendant, then, to come forward with further evidence to prove his innocence (Tr. p. 2154)?

A. They would have to prove to me beyond a reasonable doubt before I would convict him.

Q. But you would require him to come forward with evidence?

A. No, not exactly, no.

Q. And if he did not take the witness stand, would you consider that as evidence against him?

A. No, not exactly—no.

Q. Well, would you?

A. No, not him exactly, no. I would have to have some evidence on both sides before—the State would

have to prove to me he was guilty before I would convict him.

Q. Let's say somebody says he did do it, committed the crime, and no other evidence, would you require the defendant to come forward with some evidence?

A. No, not exactly. They would have to prove that he was guilty on a reasonable doubt before I would convict him.

Q. And if there was some doubt, you would find him not guilty, is that right?

A. To the best of my knowledge, yes.

Q. Let me ask you this question—let's say we were down at Evansville and you were sitting down there in Circuit Court on a charge, criminal offense such as this, as the defendant, and this man over here was sitting up there in that jury box down there in Evansville, would you want him to be a juror in your cause, having in mind what you know?

A. Do I have to answer that (Tr. p. 2155)?

Mr. McGregor: Your Honor, we object to that, as to whether he would want this defendant to sit on his jury, having in mind what he knows. Now, that's just not a proper way to put that question, and it would be immaterial as to whether he would want this defendant sitting on his jury or not.

The Court: I don't think he has the whole question in there.

Objection sustained.

By Mr. Lopp:

Q. Mr. Higginbotham, let's assume we were down there in Evansville today and you were on a charge of the same offense that this defendant is and you were down there sitting at the counsel table and this

defendant was sitting up there in that jury box where you are sitting now, now you, knowing and having in your mind what you know about the facts of this case, if any, would you want this defendant to sit as a juror in your case?

A. Well, I'd rather not say.

Q. Well, I'm asking you to. . .

A. No, I don't think so.

Q. You wouldn't want him to. You would want somebody as a juror that knew nothing about the case, wouldn't you?

A. Yes, sir.

Q. Is that because you would feel that he could not give you a fair trial?

A. Well, I don't know (Tr. p. 2156).

Q. Well, that would be the answer, wouldn't it?

A. I don't know.

Q. Well, what do you think about that deal? That would be the truth of the situation, though, wouldn't it? Would you think that he would be influenced by what he knew, then, in reaching a verdict if he was sitting as your juror with those things in his mind?

A. He might.

Q. He might?

A. I don't quite get your question. I don't exactly know what you're driving at.

Q. Mr. Higginbotham, assuming again that you were down in Vanderburgh County in Evansville on trial for the same charge as this defendant?

A. Yes, sir.

Q. And you were sitting there at the counsel table with your attorneys and this defendant was sitting in the jury box where you are sitting right now.

A. Yes, sir.

Q. And you knew that he knew certain things and

had certain opinions and thoughts—would you want him to sit on the jury in your case?

Mr. Sandusky: Judge, I am going to object to that for the reason that I don't think it's a fair question to put to this juror in the way in which he frames the question. The truth of the matter is, this juror might not want anybody but his own mother sitting on the jury and he presupposes certain situations which are unexplained in the question, and I do not believe it is (Tr. p. 2157) a fair question.

The Court: He can answer the question if he understands it. If he doesn't say so.

A. Well, I don't hardly know what to say.

Q. Would you want him to sit as a juror in your cause, having in mind the things that you know now?

A. Well, I don't know.

Q. What?

A. I don't know.

Q. Would you think that if he was sitting in your place and you was sitting at this table that he would have things in his mind that would cause him to be influenced?

A. Might.

Q. Irrespective of the evidence?

A. I don't know how to answer that.

Q. Well, then, do you then have a certain fixed opinion as to the guilt or innocence of this defendant?

A. Somewhat, yes.

Q. That's from reading these newspapers and radio listening, is that right?

A. Yes, sir.

Q. Is there any other sources that caused you to have this opinion?

A. Well, when all these people were killed, it stopped all of a sudden. I don't know whether that had anything to do with it or not.

Q. And that's what you have in your mind, is that right?

A. Partly, yes (Tr. p. 2158).

Q. In determining whether or not he is guilty or innocent?

A. Well, not altogether but some.

Q. That's what influences your opinion, is that right?

A. Partly, yes.

Q. Would it require evidence to remove that opinion from the State of Indiana or on behalf of the defendant?

A. Well, there would have to be proof, yes.

Q. It would require evidence to remove that opinion that you now have, is that right?

A. Yes, sir.

Q. Either by the State of Indiana or by the defendant, wouldn't it?

A. Yes, sir.

JUROR—CLIFFORD MONTGOMERY (Excerpts and condensed recital from testimony):

Name is Clifford Montgomery. Farmer. Read the newspapers about the matter. Subscribe to Princeton Democrat and Evansville Courier. Delivered to my home. Read about this defendant. Discussed the newspaper items with neighbors. "That's something, that murder happened, or what about that" (Tr. p. 2469). I would like to say I haven't reached a conclusion. I have known people who were charged with things they didn't do. I have known people who were turned loose and actually did the job. Newspapers say he confessed. Some one said last Sunday that he did not confess. (Tr. p. 2470). You can't forget what you hear and see. Haven't thought much about this thing (Tr. p. 2471).

I wouldn't feel that I knew all there was to be known about this case if I didn't know why he didn't testify in his own behalf (Tr. p. 2472). Understand the law in criminal case the defendant does not have to testify in his own behalf.

Q. In other words, if he failed to testify, you would want some reason such that he was insane or mentally incompetent or for some reason like that why he should not testify, is that when you mean (Tr. p. 2473)?

A. That's what I mean.

Q. In other words you would require some explanation from his attorney or the court or somebody why he hasn't testified wouldn't you?

A. I would require some mental knowledge or feeling as to why he didn't testify before I could say yes or no, on a matter of such great importance (Tr. p. 2474).

Has not changed his opinion since yesterday. I don't think I formed an opinion as to the guilt or innocence of the defendant. I don't think I am biased or prejudiced for or against him. What I read in the newspapers I don't think has caused me to be biased or prejudiced (Tr. p. 2629). Police officers' statements would not be conclusive (Tr. p. 2630).

Read the newspaper accounts of this crime about the defendant in Evansville Courier. I read in the paper that the police had a man that they claimed he confessed. I don't know whether he did or not. I don't know whether this particular defendant. Read the newspapers that this defendant has been charged or allegedly committed other offenses. Well, I read that there were other murders and that the police supposedly reported to the papers. I guess they did, I

don't know—the paper had it that this man confessed or claimed he did it, or something of that nature. I don't know what he confessed to any robberies, any specific murders or with any murder. I don't know. I don't have any opinion whether this defendant committed those offenses in Kentucky—somebody did, but I don't know who.

JUROR—WILLIAM HENSLEY (Excerpts and condensed re-tal from testimony):

Q. Whether or not you have formed or expressed an opinion regarding the guilt or innocence of this defendant?

A. Well, just what I read in the newspapers, Judge, Your Honor (Tr. p. 2221).

I thought you meant, had formed an opinion since I been sitting in the court room.

Q. Have you?

A. I said I hadn't, but when I was put in here, I said I had to a certain extent (Tr. p. 2632). I heard of other charges or offenses against the defendant. Read them in the newspapers. The other offenses these fellows stated that took place in Kentucky.

Q. Have you had any opinion as to defendant's guilt or innocence in this matter?

A. Not too much (Tr. p. 3312).

Q. I understand you said at one time you formed or expressed an opinion as to defendant's guilt?

A. Just slightly, sir, when I came in here. Read newspaper accounts of other crimes. I don't know if it was the defendant, I don't know who it was. I read where it was (Tr. p. 3846). Do not know what the nature of the other offenses were, just what I read. Just where some person had killed those people in Kentucky. I don't know who done it or anything about

it. I have no opinion who done it. I don't cultivate such stuff in my mind.

Q. Your slight opinion that you had of defendant's guilt, was that, that the defendant had shot, killed and murdered the deceased, Kerr?

A. All I know is what I read in the newspaper. I don't know what you call that an opinion or not. I know somebody did it. But, as far as he done it, I don't know.

Q. Do you have the opinion though, that he did it?

A. Well, according to the newspapers, naturally you would have some slight opinion, sure, but, I have no fixed opinion. I don't know who did it (Tr. p. 3847).

Q. But, you did have your opinion that the defendant did shoot, kill and murder Kerr?

A. According to the newspapers at the time, but, as I say, I don't sit around and cultivate that stuff.

No, I don't have that opinion. I read the newspaper where he shot him. Whether he did it robbing him or not, I don't know.

Q. Do you have an opinion whether or not the defendant committed the crimes in Kentucky?

A. I certainly could, Judge. Not that I want to sit here, but I can give the man as fair a trial as I would expect.

JUROR—JASPER JOHNSON (Excerpts and condensed recital from testimony):

Take the newspaper, Princeton and Evansville Courier. Read in the paper about the defendant (Tr. p. 2505). Probably discussed the case with my neighbors. Probably discussed it with my customers. My wife.

Q. Have you formed an opinion as a result of these newspaper articles?

A. Well, most of my opinion was the crime was committed, the shock of it that is all, like any natural feeling anyone would get. Have not formed any opinion as to defendant's guilt. I have heard talk generally about defendant's guilt (Tr. p. 2506). Reasonable doubt was put in my mind. Would not consider what I read in the newspapers as evidence.

Q. You merely think you could set that aside?

A. Well, it has been some time since I read them and you hear different things here and there. It would have to be evidence before I would believe it (Tr. p. 2507). I believe in the enforcement of the law. Understand the law "and on conviction shall suffer death or be imprisoned in the state prison during life" (Tr. p. 2520). Does not have conscientious opinion of the death penalty that would keep him from returning the death penalty verdict. If evidence warranted would as readily call the verdict of death penalty as one for life imprisonment (Tr. p. 2521).

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Q. You haven't formed or expressed any opinion as to the guilt or innocence of this defendant?

A. Not definitely at all; of course, everybody reads the papers and you hear it discussed, but not to form any definite opinion (Tr. p. 2627).

Q. You have never sat on a jury, have you, in a criminal case?

A. It wasn't this strong a case.

Q. Now, you don't think you have formed any opinion about the guilt or innocence of this defendant then?

A. Well, no, no set opinion (Tr. p. 2628).

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I have read the newspapers about the defendant (Tr. p. 3318).

Q. Have you formed any opinion as to his guilt or innocence?

A. I wouldn't call it an opinion. I might have the impression being as that is, the person that was arrested. I read the Evansville Courier and Princeton paper. I read about when the defendant was arrested. I read the news items about the other offenses against the defendant. The other offenses were the Holland case in Evansville and in Kentucky and at Mt. Vernon.

Q. This impression that you have, after reading those papers, is it that the defendant is guilty or not guilty?

A. Yes, the impression is that he is.

Q. That he is guilty?

A. Possibly, in some of them.

Yes, I think it would be natural that you get the impression from reading the account (Tr. p. 3319).

Q. Mr. Johnson, as I understand, you have at one time stated here that you have expressed or formed an opinion that the defendant was guilty?

A. More or less an impression than an opinion. I have not expressed the opinion nor the impression that he was guilty. I have read the newspapers about the defendant. I did not read the confession. The confession was not discussed (Tr. p. 3350). I have read about this defendant being accused of having committed other crimes.

Q. Whether or not you have this opinion or impression that the defendant did shoot, kill, murder one Kerr?

A. The impression.

Q. Whether or not you have the opinion or the impression that the defendant shot, killed, murdered one Kerr while in the commission of a robbery?

A. Same impression (Tr. p. 3851).

By the Court:

Q. Now, Mr. Johnson, I believe on numerous occasions you have told counsel on both sides and also told this court that regardless of any opinion or impression that you ever had, that you could lay that impression aside and try this case solely upon the law and the evidence introduced here and arrive at your verdict solely upon the law and the evidence as introduced in this court room, is that right?

A. Yes, sir.

Q. And that's the way you feel about it?

A. Yes, sir (Tr. pp. 3851-3852).

JUROR—PHILLIP MONTGOMERY (Excerpts and condensed recital from testimony):

Name is Phillip Montgomery. I understand the nature of the case. All I know about the case is what I read in the newspapers. I have heard people talk about the case. All I know is newspaper talk, hearsay and rumors.

Q. Now, from listening to that newspaper talk and so on, have you formed any opinion at this time as to the guilt or innocence of the defendant?

A. Well, I suppose I have in a sense, yes, sir.

Q. Is it an opinion or impression you might have concerning this then?

A. I wouldn't know, sir, how (Tr. p. 2678).

Q. Would you say you have a fixed opinion concerning the guilt or innocence of the defendant?

A. Yes, sir.

Q. You have ideas one way or the other from reading the newspapers?

A. Yes, sir.

He thinks he can set aside his opinion (Tr. p. 2679). Man is presumed to be innocent until proven guilty.

Q. Well, if you are chosen as a juror could you follow that law?

A. I could try.

Q. I say could you? We got to know that?

A. I suppose so. I wouldn't just definitely answer that, sir. I think I could look at it with an open mind (Tr. p. 2680). I believe in enforcement of the law.

Asked if he had conscientious opinions concerning the death penalty that would preclude him from fixing the death penalty:

No, sir, I believe I could stand up to that (Tr. p. 2681) I could return a verdict giving the death penalty. I could return a verdict for the death penalty as one for life imprisonment as readily (Tr. p. 2682).

Not changed my opinion since sitting here about these matters. Take the Evansville Courier. Brought to my home. Read it. Read the newspaper accounts about this defendant. Discussed it with other people.

Q. Would you say you have expressed or formed an opinion as to his guilt or innocence?

A. I probably have at times earlier in the case when it first came out in the paper (Tr. p. 2854). I read of that Kentucky account, and that's all I can remember reading in the papers, sir. That's where this family was killed. That's the murder down there.

Q. This defendant was alleged to have murdered?

A. That was in the paper that he did.

Q. Do you have any opinion at this time as to any punishment to be fixed in this particular case?

A. Not as yet, sir.

By the Court:

Q. Mr. Montgomery, I will ask you whether or not you have been examined on this matter on several different occasions both by the State and the Defense?

A. Yes, sir, I have.

Q. And I believe you stated at that time on all of these examinations that even though you might have at one time had an opinion, that you would lay that opinion aside and give this man a fair and impartial trial based solely and entirely upon the law and evidence introduced in this court room?

A. I did that, sir.

Q. And that's what you will do?

A. Yes, sir (Tr. pp: 3854-3856).

JUROR—NEWMAN S. GWALTNEY (Excerpts and condensed recital from testimony):

I am a farmer. Subscribe to Princeton paper. Read articles about this defendant in newspaper.

Q. Can you tell anything that you read?

A. About the only thing I remember is I couldn't see how one man could have committed that killing in Kentucky. At least, I would have liked to have been one of those three men.

Q. Did you read of any other offenses this defendant was alleged to have committed?

A. If I did, I have forgotten them. I have heard opinions.

Q. Have opinions been expressed to you as to defendant's guilt or innocence by other people?

A. Why, sure (Tr. p. 3891).

Q. Who were those people?

A. They were people in the community.

Q. Can you give me some idea who these other people were that expressed their opinions to you?

A. Yes, well, there was a farmer in Kentucky said he would like to get his hands on him.

Q. You knew this farmer in Kentucky?

A. Yes, sir.

Q. Was this farmer a friend of yours?

A. Yes, sir (Tr. p. 3892).

He just stated that whoever did do it, he would like to be in a gang to get hold of him.

Q. Did you have any opinion at that time?

A. More or less. If you meet a person you form an opinion of some kind.

Q. Well, do you think the fellow that committed the crimes in Kentucky committed this one we are talking about in Indiana, about Kerr?

A. It is possible. I haven't formed any opinion to that effect. From evidence you gather you would think yes, all the crimes was committed by the same party.

Q. And that impression would be from reading the newspapers?

A. One way or the other, yes, sir.

Q. But you have acquired this information that the defendant committed this particular crime, is that right?

A. Yes.

Q. That he is charged with now?

A. Yes.

Q. You have acquired information that the defendant committed other crimes, too?

A. Yes, sir.

Q. What other crimes?

A. Well, he is supposed to be connected with all of them, the three in Kentucky.

Q. Did you acquire information that this defendant did then shoot, kill and murder the deceased Kerr charged in this matter?

A. Looks like to me you are driving at the same thing again.

Q. Well, did you acquire that information?

A. I said it once (Tr. p. 3894).

Q. Did you acquire the information that the defendant shot the deceased Kerr in the perpetration of a robbery?

A. Through the same source, yes.

Q. That's the newspaper, is that right, sir, and conversation with friends and relatives?

A. Right.

Q. Did you acquire information that this defendant has confessed to those crimes?

A. I have heard that somewhere.

Q. Was it discussed by you at home with your family?

A. That wouldn't make a very good mealtime topic (Tr. p. 3895).

Q. Have you formed or expressed any opinion as to the punishment to be fixed for the commission of the criminal offenses in Kentucky?

A. I have not formed or expressed any opinion as to the punishment to be fixed in the particular charge now before the court.

Q. Have you had any information by newspapers or by the conversation that would cause your opinion to be that the defendant was innocent of the crime charged?

A. No, sir (Tr. p. 3896).

By the Court:

Q. Mr. Gwaltney, I believe you advised us that you have never formed any opinion on this matter as to the guilt or innocence of this man?

A. That's right.

Q. You do not have any opinion at this time as to the guilt or innocence of this defendant?

A. Why, no.

Q. And if you are selected as a juror in this case, whether or not you could honestly and impartially try this defendant on the charge on which he is charged here and be governed solely and entirely by the law and evidence introduced in this court room?

A. To the best of my knowledge, yes, sir (Tr. p. 3897 and p. 3898).

JUROB—EUGENE PEMBERTON (Excerpts and condensed recital from testimony):

I am a farmer. Take the Princeton paper. I have read articles in the newspapers about the defendant. Heard radio programs about him. We have talked about the case. We have discussed his guilt or innocence. Can't truthfully say that I ever read anything. Read just the other things regarding the defendant, not this particular crime. According to the newspapers read about the other alleged crimes (Tr. p. 4062). I believe they were concerning a woman around New Harmony, and then there was something about some people in Kentucky.

Q. And is it your opinion that the party that committed those other crimes that you enumerated, that is Posey County and Henderson County crimes, would be the one and same party that committed this particular crime?

A. As far as my opinion is concerned I have never expressed none, except that there was a connection, but I have read where there was such a connection (Tr. p. 4064).

Have not formed an opinion that the party committed the other crimes committed this crime.

Q. But what you read would state what?

A. At least that is the impression.

Q. At least the impression?

A. Yes, that is, the paper created the impression that such was so (Tr. p. 4064).

Do not remember whether the newspapers said anything about a confession. I have not formed an opinion. No one has talked to me about the case (Tr. p. 4065).

The articles that I read in the newspapers and the people talked to did mention the defendant's name with the particular crimes. Read the newspaper articles for approximately a year or so. Do not know the people that are alleged to have been killed (Tr. p. 4066). Reason he hasn't formed any opinion after reading the newspapers, "Well, one thing, I don't spend much time with stuff like that. I got other things to do, and my mind is on other things" (Tr. p. 4067). Newspaper articles not sufficient to form an opinion on.

Q. Has any member of your family been harmed or violently assaulted?

A. It was my father.

Q. What happened to him?

A. He was shot and killed (Tr. p. 4309).

Q. Was there a criminal prosecution, as a result of that?

A. Yes, sir.

Q. Whether or not there was a murder charge filed against the accused person that shot your father?

A. Yes.

Q. Was he convicted?

A. Yes.

I have raised the family and sent them to school (Tr. p. 4310). I have no feeling against the defendant because of this previous occurrence. Will not use the unfortunate experience he has had against the defendant (Tr. p. 4311).

By Mr. McGregor:

Q. Mr. Pemberton, you say you could and would give both sides a fair trial based entirely and solely on the law and the evidence, is that right?

A. Yes, sir, I think I could.

Q. And this experience Mr. Lopp was talking about concerning your father would not enter into your verdict in any respect, is that right?

A. No, sir.

Q. And I believe you say you have no opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. And you have no opinion as to any of the alleged facts concerning this case, is that right?

A. That's right, sir.

By the Court:

Q. You could give this defendant as well as any other defendant, a fair and impartial trial based solely and entirely upon the law and evidence introduced in this court room, is that right?

A. Yes, sir.

Q. And that's what you would do?

A. That's right, sir.

JUROR—RALPH W. BAILEY (Excerpts and condensed recital from testimony):

Work at International Harvester. Subscribe to Evansville Courier. Read what's been published in the paper about the defendant. Read articles in the paper about the defendant (Tr. p. 4295). Talked to the man I ride back and forth to work with quite a bit. Read the newspapers, actually, the crimes he was supposed to have committed, that's the general outline of the newspapers. Read or heard about the

crime of the deceased Kerr. Read about the defendant down in Kentucky, liquor store, and the one in Posey County (Tr. p. 4296). Did not read about the confession. What I read was discussed over a period of time.

Q. But, until this trial started here, you have surely formed some opinion as to his guilt from reading the newspapers and talking to your people, haven't you?

A. Normally, I suppose like everybody else, you normally think that the man must be guilty of his crimes.

Q. It would be quite obvious in thinking that?

A. Yes, in reading the newspaper articles and all you right away say, "Well, I guess the man is guilty."

I believe it is up to the court to prove the man guilty (Tr. p. 4298). I think the newspapers is just there to give the news and views of things, that's why they are printed. You can't believe all you read in the newspapers.

I read in the newspapers about the holdup at the service station. I believe that's what it was called—service station. That was the first one. Can't recall what the defendant was doing at the time he shot the deceased.

CONFESSION

During the course of the trial over the objection of the petitioner a purported admission and confession was permitted to be introduced into evidence. That said question propounded by the Prosecuting Attorney to one Dan Hudson during the course of the trial being as follows:

"What if anything did the defendant say to you about the murder of Whitney Wesley Kerr when

he talked to you on Tuesday, April 12, 1955?" (Tr. p. 1615)

That the petitioner objected to said question and the following objection and offer to prove is found in Tr. pp. 1615 to 1623, which reads as follows, to wit:

Mr. Lopp: To which the defendant objects for the following reasons: that any admission or admissions, confession or statement made at the time referred to or during the time the defendant was in custody of this police officer, the police department of the City of Evansville and while confined in the city jail in the City of Evansville were made:

1. Under inducement, under the influence of fear produced by threats, intimidation and undue influence.

2. That the police officers inflicted physical violence and punishment upon the defendant then and there being held in custody by said police officers; that said police officers threatened to inflict personal violence and injury to the defendant and that the said police officers deprived the defendant of necessary food, sleep and all for the purpose of extorting from the defendant an admission and confession that he was guilty of violating some municipal, state or federal laws, and, particularly, the murder of one Kerr.

3. That said admissions, confessions, as stated before, if any made, were made under duress, fraud and coercion and under lawless inquisitorial means and in violation of the Bill of Rights of the Constitution of the State of Indiana, Article I, Section 14, which provides: "No person in any criminal prosecution shall be compelled to testify against him-

self"; also, in violation of the Constitution of the State of Indiana, Article I, Section 15, which provides "No person arrested or confined in jail shall be treated with unnecessary rigor"; in violation of the Constitution of the State of Indiana, Article I, Section 12, which provides: "All courts shall be open and every man for injury done to him in his person, property, or reputation shall have remedy in due course of law; justice shall be administered freely and without purchase, completely and without denial, speedily and without delay"; and in violation of Section 9-704, Burns' Indiana Statutes Annotated, 1933-1942 Replacement, the same being Chapter 169, Section 65, page 584 of the Acts of the General Assembly of the State of Indiana for the year 1905 and amended by Chapter 108, Section 1, page 442 of the Acts of the General Assembly of the State of Indiana for the year 1909, which provides in part as follows: "When an officer arrests an accused, either upon his warrant or for a misdemeanor committed within the view of the officer or for a felony when the officer has cause to believe that such crime has been committed, he shall take the accused before the magistrate issuing a warrant, if a warrant has been issued, or before the nearest magistrate, if no warrant has been issued and it shall be the duty of the magistrate to immediately docket the cause in a well-bounded book used for the sole purpose of maintaining a docket under the title, State of Indiana v. ———, inserting the Christian and surname of the accused, and to hear the cause and either acquit, convict or punish and hold to bail, the offender, or, if the offense be not bailable, to commit him to jail as the facts and law may justify"; and furthermore, in violation of

Section 9-711, Burns' Indiana Statutes Annotated 1942 Replacement, the same being Chapter 169, Section 72, page 584 of the Acts of the General Assembly of the State of Indiana for the year 1905, further providing, "When the offense charged is a felony or a misdemeanor in which the lowest fine provided by law is larger than the Justice shall have jurisdiction to assess and the Justice, upon the hearing, is of the opinion that the accused shall be held to answer such charge, he shall be recognized to appear at the next term of the criminal court of such county, or, if there be no criminal court, then in the circuit court of such county," and Section 4-2402, Burns' Indiana Statutes Annotated, 1946 Replacement, the same being Chapter 129, Section 216, page 219 of the Acts of the General Assembly of Indiana for 1905, as amended, being Chapter 70, Section 1, page 153 of the Acts of the General Assembly of the State of Indiana 1921, as amended, being Chapter 7, Section 1, page 12 of the Acts of the General Assembly of Indiana for 1939, providing in part: "The city judge shall hold daily sessions of the city court, Sunday and legal holidays excepted, at a place to be provided and designated by the common council. He shall have and exercise within the city in which such court is located the powers of jurisdiction now or hereinafter conferred upon Justices of the Peace and in all cases of crimes and misdemeanors, he shall also have original concurrent jurisdiction with the circuit court or criminal court in all cases of petit larceny and all other violations of the law of the state where the penalty provided therefor cannot exceed a fine of five hundred dollars and imprisonment in the jail or work house not exceeding six

months, or either or both, provided that such city judge in any such case being brought before him, charging any person with a crime or misdemeanor, if in the opinion of such judge the punishment which he is authorized to assess is not adequate to the offense, may so find, and, in such case, he shall hold such prisoner to bail for his appearance before the proper court or commit him to jail in default of such bail"; in violation of Section 9-1024, Burns' Indiana Statutes, 1942 Replacement, which provides as follows: "All judicial officers, sheriffs, deputy sheriffs, coroners, constables, marshals, deputy marshals, police officers, watchmen and the conductors of all trains or cars carrying passengers or freight within the state while on duty on their respective trains or cars, may arrest and detain any person found violating any law of this state until a legal warrant can be obtained"; in violation of Article I, Section 13 of the Constitution of the State of Indiana, and in violation of the due process clause of the 14th Amendment to the Constitution of the United States of America, in that said police officers unlawfully, illegally, so holding and detaining the defendant, denied the defendant the right of counsel and that such denial and refusal on the part of the police officers was a denial of due process as defined by Article I, Section 13 of the Constitution of the State of Indiana and the 14th Amendment to the Constitution of the United States of America. It is illegal in this: that all the aforesaid acts of said police officers, including said unlawful detention of the defendant, were acts on the part of executive and administrative officers of the State of Indiana in the execution of the State laws of Indiana, which constituted State action, within the purview of the 14th Amendment to the Constitution

of the United States of America, said 14th Amendment governing any action of a state "where through its legislative, through its courts or through its executive or administrative officers . . . " It is illegal in this: that anything and everything learned by the police officers while interrogating the defendant at any time and all times prior to a preliminary charge being filed in the city court in the City of Evansville, Indiana, during all of the time that the defendant was in the sole and exclusive custody of the police officers, was so learned by them without the voluntary consent of the defendant: that the defendant was then and there in sole and absolute custody and control of the police officers and had been without sleep or rest for twenty-four hours or more and in continuous interrogation, that any statement so made by the defendant, whether oral or written, was involuntarily given and was made and given under inducement, under the influence of fear, produced by threats, intimidation, undue influence and fraud, and the action of the police officers were coercive and in violation of the due process clause of the 14th Amendment to the Constitution of the United States of America and of Article I, Section 12, of the Constitution of the State of Indiana, and that the defendant did not thereby waive his constitutional immunities by making said statements, whether oral or written.

Illegal in this: that due to said illegal, unlawful and fraudulent procuring of the oral statement from the defendant by said police officers, an attempt is being made to compel the defendant to be a witness against himself involuntarily and in a criminal prosecution in violation of Article I, Section 14, of the Constitution of the State of Indiana, and in violation

of the due process clause of the 14th Amendment to the Constitution of the United States of America. Illegal in this: that the defendant had been detained by the police officers an unreasonable time after his arrest before the alleged confession statements, admissions, written or oral, were made, all in direct and constant violation of the due process clause of the 14th Amendment to the Constitution of the United States of America, and in violation of Article I, Section 14, Article I, Section 15, Article I, Section 12 of the Constitution of the State of Indiana, and in violation of Sections 9-704 and 9-1024, Burns' Indiana Statutes Annotated, 1942 Replacement. Illegal in this: that said written, if any, and oral statements procured by the police officers from the defendant were obtained in a manner which rendered them untrustworthy and were procured by coercion, duress and fraud and in violation of the due process clause of the 14th Amendment to the Constitution of the United States. Illegal in this: that upon arresting the defendant, the police officers put the defendant in a barren cell at police headquarters in the City of Evansville, Indiana, and in a sweat box room and kept him there incommunicado for a period of seven days and submitted him to unrelenting questioning without proper food and sleep and rest instead of taking the defendant forthwith before a Justice of the Peace or a court or without procuring a warrant for his arrest nor taking him before some judicial officer as the law requires in order to determine the sufficiency of the justification for his detention, and the police officers' conduct was a flagrant disregard of the laws of the Constitution, both of the State and Federal, in such case made and provided, and such action and conduct

of the police officers toward the defendant was inherently coercive and in direct and constant violation of the statutes of the State of Indiana, the due process clause of the 14th Amendment to the Constitution of the United States of America; that the defendant was denied the right to counsel during the wrongful and unlawful detention by the City Police Department of the City of Evansville. He was denied the right to be advised of his legal rights by counsel, a lawyer appointed by a court of law to represent this defendant at any time during the time he was unlawfully detained; that said defendant was never brought before a magistrate or court of law and advised of his rights to counsel and have counsel appointed for him to represent him during these seven long days he was held in the city jail in the City of Evansville.

The defendant further objects for the reason that the corpus delicti of the charge now pending against this defendant has not been proved in that, first, the deceased, Kerr was murdered; secondly, the corpus delicti of robbery, being part of the charge, has not been proven by the State of Indiana. There has been no evidence that the deceased, Kerr, was robbed of \$68.11, or any sum of money, by this defendant or any other person.

The defendant further states that he was unlawfully and illegally taken from Warrick County in the State of Indiana to Vanderburgh County, State of Indiana, by police officers, one Praither, Clayborne and Cornett; that he was arrested illegally by said police officers. At that time, they had no warrant for his arrest; that said defendant was not in flight and said police officers were not in pursuit of said defendant; that the said police officers did not

take the defendant forthwith to a magistrate or court of law in Warrick County; that they had no warrant from any court in the State of Indiana for the arrest of the defendant; that they did not have probable cause or justification for arresting the defendant under the laws of the State of Indiana; that the defendant had not committed any misdemeanor in the presence of said police officers mentioned; that said defendant had not committed a felony in the presence of police officers mentioned; that the said police officers returned said defendant from Warrick County, Indiana to the City Police Department in the City of Evansville and held said defendant incommunicado for a period of seven days in the city jail in the City of Evansville and did not take this defendant before any court of law or magistrate or file any charges against this defendant during said time; that the officer claiming to arrest said defendant, one Cornett; being a State Police Officer; that said State Police Officer did not deliver the defendant to the Sheriff of either Warrick County or to the Sheriff of Vanderburgh County as required by law; that at no time from the time of the arrest of the defendant for a period of seven days thereafter was a warrant issued for his arrest or detention; that the defendant did not voluntarily, freely, under any circumstances, make any statement or confession to this witness or any other police officer in whose custody he was at said time, all of which the defendant now asks leave of court to prove and introduce evidence to prove the same.

The Court: Objection overruled.

That the said witness was permitted to answer, and he answered as follows:

"He told me that he had shot and killed Wesley Kerr."

PROSECUTING ATTORNEY ARGUING CASE BEFORE JURY
AFTER TESTIFYING AS WITNESS

Paul B. Wever, prosecuting attorney for the State of Indiana in the within cause, assisted in the selection of jurors during the voir dire examination, examined witnesses during the course of the trial, was permitted, over Petitioner's objections to testify as a witness, and was then permitted to make an argument to the jury, over Petitioner's objection, as shown by the record as follows:

That said Paul B. Wever testified as a witness as shown by the Transcript at page 1824.

That the Petitioner herein objected to said Prosecuting Attorney testifying, which objection is found in Transcript p. 1833 L. 23 to Tr. p. 1834 L. 11, Petitioner's Exhibit No. 1, and reads in part as follows:

The defendant further objects for the reason that the witness is the duly qualified Prosecuting Attorney of Vanderburgh County, and the duly appointed Prosecuting Attorney for this cause; that said witness as said Prosecutor has participated in the selection of this jury, questioning the jurors on the voir dire, and has participated in the examination of the witnesses in this cause; that said witness is a paid witness; to permit said witness to testify in this matter would be permitting said witness to be a Judge for his position as Prosecutor is a judicial office, and by virtue thereof, he would be the Judge, the Prosecutor and a witness in this cause against this defendant; violating the defendant's constitutional rights, and his testimony would be inadmis-

sible for the further reason that said court has made an order of the separation of the witnesses in this cause, and to permit this witness to testify at this time would be prejudicial against this defendant and illegal.

That Paul B. Wever, Prosecuting Attorney made a final argument before said jury, over Petitioner's objection, as shown by Tr. p. 4770 L. 1 to Tr. p. 4771 L. 5, which objection reads as follows, to-wit:

JAMES D. LOPP, ATTORNEY FOR DEFENDANT:

The defendant at this time, being informed that Paul Wever, Prosecuting Attorney, is now preparing to address the jury in argument of this cause before said jury and before the beginning of said argument by said Paul Wever, the defendant now objects to the said Paul Wever arguing and participating in the argument of this cause before this jury for the reasons:

1. That it is unethical for him to participate in the argument of this cause due to the fact that he has become a witness for the State of Indiana.

2. The Court in permitting said Paul Wever to argue the facts in this case before said jury, would be permitting him to comment upon his own testimony and give further weight to the same and further weight to the State of Indiana's evidence.

3. That the defendant will not be, under said circumstances, offered the privilege of cross-examining the said Paul Wever on matters that he will state before said jury.

4. That any statements said Prosecuting Attorney will make before said jury will be prejudicial to

this defendant's rights and denying him the right to cross-examine said Paul Wever, all of which the defendant now offers to prove out of the presence of the jury.

The Court: Objection overruled.

James D. Lopp: The defendant now requests the reporting of the address of Paul Wever to the jury in order that the defendant may file a special bill of exception.

The Court: Show that that will be overruled. I do not know of any law at all that requires a Reporter to take final arguments.

That thereafter, Paul B. Wever stated before the jury:

"I testified myself what was told me" (Tr. p. 471, L. 11).

Summary of Argument

1.

Petitioner was not afforded a fair and impartial trial within the meaning of the Fourteenth Amendment to the Constitution of the United States for the reason that over half of the jurors selected to try the cause had preconceived opinions that the Petitioner was guilty of the offense with which he was charged. Petitioner's verified motion for change of venue from the county of trial, and verified motions for continuance were denied without affording Petitioner a hearing thereon. Petitioner exhausted all his peremptory challenges, and of the 431 prospective jurors examined, 269 were excused because of their fixed opinions as to Petitioner's guilt. In the dissenting opinion of Justice Duffy of the United States Court of Appeals for the Sev-

enth Circuit in this cause on remandment, he stated at 271 F. 2d 552, 561:

"In my judgment defendant was not afforded due process of law in the trial which resulted in his conviction and upon which verdict the death sentence was imposed.

"There is no dispute as to the fact that more than half of the jurors who sat in the case had preconceived ideas that defendant was guilty of the offense charged. Some of them testified on the voir dire that it would take evidence to change that opinion. Defendant had exhausted his twenty peremptory challenges. His several motions for continuances had been denied.

"One of the most important rights of our citizens is the right to a public trial by a fair and impartial jury. The courts should be ever alert to preserve that right untarnished. *Baker v. Hudspeth*, 10 Cir., 129 F. 2d 779, 781.

"I am well aware that a brutal crime is almost certain to receive extensive news coverage by newspapers, radio and television. I realize that in the instant case a prolonged effort was made to obtain an impartial jury, but I am, nevertheless, forced to the conclusion that the jury, as finally constituted, was not impartial. Possibly it was as impartial a jury as could have been found in Gibson County on that date, but that was not sufficient. That did not insure due process."

2.

Petitioner's verified motions for change of venue from Gibson County, Indiana, where trial was had in this cause, based upon the alleged bias and prejudice in said community against this petitioner, were denied, notwithstanding the fact that the prayer of each of Petitioner's motions offered to prove and requested an opportunity to prove

bias and prejudice against this petitioner in Gibson County. The trial court denied the motions for the sole reason that Petitioner had previously been granted a change of venue from the immediate adjoining County of Vanderburgh, Indiana. At no time was Petitioner ever afforded an opportunity to introduce evidence in support of the allegations of bias and prejudice, in addition to those matters, things and exhibits set forth in the verified motions. Petitioner was denied without a hearing the opportunity to prove actual bias and prejudice. The State of Indiana at no time filed affirmative answers denying the allegations set forth in the verified motions, although the prosecuting attorney did admit in a radio broadcast that because of the extensive news coverage, it was difficult to get a jury. Even though the Petitioner's motions were denied without permitting him to introduce evidence, the voir dire examination and the answers given during the jury examination, together with the statements of those jurors finally selected, coupled with the evidence in the verified motions for continuance filed in this cause, there was sufficient evidence to establish that Petitioner was denied a fair and impartial trial before a fair and impartial jury, as contemplated by the Fourteenth Amendment to the Constitution of the United States, and that a change of venue from Gibson County, Indiana, should have been granted.

Shepherd, et al. v. State of Florida (1951), 341

U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740;

Juelich v. U. S. (5th Cir. 1954), 214 F. 2d 950;

People v. McKay (1951), 37 Cal. 2d 792, 236 P. 2d

145.

3.

Petitioner's verified motions for a continuance based upon the bias and prejudice in Gibson County, Indiana where this cause was to be tried, which were filed prior to

and during the course of the trial were denied. These motions were supported by exhibits, including newspaper articles and radio broadcasts, some of which were admittedly read by some of the jurors finally selected in this cause, including articles which referred to Petitioner as "the confessed killer of six persons." The trial court, as with the motions for change of venue, denied the motions for continuance, although the prayer of each motion offered to prove and requested an opportunity to prove bias and prejudice. At no time was the Petitioner ever afforded an opportunity to introduce evidence in support of the allegations of bias and prejudice, in addition to those matters, things or exhibits set forth in the motions themselves.

Petitioner was arbitrarily denied an opportunity to prove actual bias and prejudice at a hearing. The State of Indiana, as with the motions for change of venue, did not deny the allegations set forth in the verified motions for continuance. As with the motions for change of venue, the evidence in the motions, together with the voir dire examination of prospective jurors and jurors finally selected in this cause, who were of the opinion that this Petitioner was guilty, the record is clear that the Petitioner was denied a fair and impartial trial before a fair and impartial jury, as contemplated by the Fourteenth Amendment to the Constitution of the United States, because of the actual bias and prejudice existing at the time of trial in the community in which this cause was tried, and under these circumstances the trial court should have granted a continuance.

Shepherd v. State of Florida (1951), 341 U.S. 50,
71 S. Ct. 549, 95 L. Ed. 740;

Juelich v. U. S. (5th Cir. 1954), 214 F.2d 950;

Delaney v. U. S. (1st Cir. 1952), 199 F.2d 107.

In the dissenting opinion of Justice Duffy of the United States Court of Appeals for the Seventh Circuit in this

cause on remandment, in support of his argument that Petitioner was not given a fair trial, stated at 271 F. 2d 552, 561:

"When it became apparent that an impartial jury could not be obtained, the motion for a further continuance should have been granted. The majority opinion argues that a further delay might not have been helpful, but, on the other hand, that public opinion might have been aroused by the slowness of the judicial process. The passage of time is a great healer. We have no right to speculate that any subsiding of public prejudice would be offset because our fundamental law insists that a defendant in a criminal case shall have a fair trial."

4.

The trial court in denying Petitioner hearings on his motions for continuance and/or change of venue deprived Petitioner of the right to a fair and impartial trial before a fair and impartial tribunal means nothing if the accused is denied the right to produce evidence to prove actual bias, prejudice and excitement in the community. Due process requires that the accused at least have the opportunity of presenting witnesses and making a record so that a higher court could review the actions of the trial court as to whether or not bias and prejudice did exist.

In Re: Murchison (1955), 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942;

Moore v. State (1928), 118 Ohio 494;

State v. Biggs (1953), 198 Ore. 413, 255 P. 2d 1055.

5.

Due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States was

denied this Petitioner when the trial court refused to permit Petitioner to introduce evidence, including his own testimony, in support of his objection and offer to prove the involuntary nature of a purported confession prior to its introduction into evidence.

The State of Indiana, in questioning the witness, Dan Hudson, Chief of Detectives, asked the witness:

"What, if anything did the defendant say to you about the murder of Whitney Wesley Kerr when he talked to you on Tuesday, April 12, 1955?"

The Petitioner at that time objected to the witness answering said question, and at that time offered to prove that the alleged confession was of an involuntary nature, illegally and unlawfully obtained as a result of an illegal and unlawful detention of Petitioner for a period of seven days without granting Petitioner a preliminary hearing, and in violation of the laws of the State of Indiana. That said purported confession was made without Petitioner having had the right to advice of counsel, after long periods of questioning, and without affording Petitioner proper food and rest. Notwithstanding the objection made by Petitioner to the introduction of the purported confession and offer to prove, the trial court permitted the witness to answer the question in the presence of the jury, without affording Petitioner a hearing and an opportunity to question the admissibility of the purported confession.

Carignan v. U. S. (1951), 342 U.S. 36, 72 S. Ct. 97, 96 L. Ed. 48.

6.

The prosecuting attorney, during the course of the trial participated in the voir dire examination of the jurors, participated in the examination of the witnesses during

the course of the trial, and during the trial testified as a witness as to a purported confession of the Petitioner. At the close of the evidence, the same prosecuting attorney was then permitted to make a final argument to the jury, and was permitted to comment on his own testimony. Petitioner objected during the course of the trial when said prosecuting attorney testified as a witness and again objected to said prosecuting attorney arguing the case before the jury because of his prior participation as a witness during the course of the trial. It is submitted that said conduct on the part of the prosecuting attorney was unethical and denied Petitioner due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Petitioner calls the Court's attention to the remarks of Justice Duffy of the United States Court of Appeals for the Seventh Circuit in reviewing the conduct of the prosecuting attorney in this cause in 271 F. 2d 552, 561, wherein he states:

"Another reason for the failure of due process in the instant case is that one of the two state prosecuting attorneys who tried the case also acted as a witness on the trial. The majority opinion, while conceding this was error, seems to brush it aside saying: 'However, in this case we cannot adjudicate a question of ethics. * * *.' Prosecutor Wever, participated in examining prospective jurors, interposed objections to testimony, and otherwise actively participated in the trial. He then took the stand as a witness and testified concerning a confession made to him. Over objection, he made the closing argument to the jury, commenting on the evidence including his own testimony. Such conduct was in violation of Canon 19 of the Canon of Professional Ethics. Such conduct was offensive to the rights of the defendant to a fair and impartial trial."

In addition to Justice Duffy's remarks, the majority opinion admits to the serious nature of Wever's conduct, but refuse to adjudicate a question of ethics, wherein they state:

"In a forum where the ethics of Wever's conduct is directly brought in issue by the State of Indiana, it is apparent that a charge of unethical conduct on the foregoing facts would be serious. However, in this case, *we cannot adjudicate a question of ethics. . . .*"
(Our emphasis.)

Canon 19 of the Canons of Professional Ethics of the American Bar Association;

Berger v. U. S. (1935), 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314;

Dissenting Opinion No. 220, Opinions of the Committee on Professional Ethics and Grievances of the American Bar Association.

7.

Petitioner was denied an opportunity to prove actual bias and prejudice on the part of certain jurors who served in this case. During the voir dire examination Petitioner's attorney made certain challenges to these jurors and offered to prove that said jurors were biased and prejudiced. The trial court denied Petitioner the right and opportunity to introduce evidence in support of said offer to prove. Petitioner's offer to prove being uncontradicted, must be taken as true, and in the light of the due process clause of the Fourteenth Amendment to the Constitution of the United States, these jurors were incompetent to serve, and Petitioner was thereby denied a fair and impartial trial.

In Re: Murchison (1955), 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942.

ARGUMENT

I.

Petitioner's Constitutional Rights Were Violated by Forcing Him to Trial Before a Jury Composed of Jurors With a Preconceived Opinion That He Was Guilty.

Justice Duffy of the United States Court of Appeals for the Seventh Circuit, in that Court's original opinion herein, accurately summarized Petitioner's position herein with regard to those jurors who served in Petitioner's cause and who were of the preconceived opinion that Petitioner was guilty when he said:

"Irvin was not accorded due process of law in the trial which resulted in his conviction and death sentence. In my judgment, he did not receive a fair trial because some of the jury had preconceived opinions as to defendant's guilt . . .

"More than half of the jurors who sat in the case had preconceived ideas that defendant was guilty of the offense charged. Some testified on the voir dire that it would take evidence to change that opinion. Defendant exhausted his 20 peremptory challenges, and motion for continuance had been denied.

". . . the jury, as finally constituted, in my opinion, was not impartial."

Duffy, Chief Judge (7th Cir. 1958), in *Irvin v. Dowd*, 251 F. 2d 548.

Justice Duffy reiterated this opinion in this cause on remandment, 271 F. 2d 552, 561 when he stated:

". . . but I am, nevertheless, forced to the conclusion that the jury, as finally constituted, was not im-

partial. Possibly it was as impartial a jury as could have been found in Gibson County on that date, but that was not sufficient. That did not insure due process."

The right to a fair trial is protected by the due process clause of the 14th Amendment to the Constitution of the United States. *Chambers v. Florida* (1939), 209 U.S. 227; 60 S. Ct. 472, 84 L. Ed. 715; *Moore v. Dempsey* (1922), 261 U.S. 86; 43 S. Ct. 265, 67 L. Ed. 543.

"Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."

In Re: Murchison (1955), 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942;

Tumey v. State of Ohio (1927), 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. Ed. 749.

Failure to afford the accused a fair and impartial jury denies the accused a fair and impartial trial as guaranteed by the 14th Amendment to the Constitution of the United States.

A conviction obtained in such instance is illegal and void, and violates due process of law under the 14th Amendment. Through the use of the writ of habeas corpus the accused may seek relief in the courts for alleviating this wrong.

Baker v. Hudspeth (10th Cir. 1942), 129 F. 2d 779, 781.

The United States Court of Appeals for the 5th Circuit in *Juelich v. U. S.* (5th Cir. 1954), 214 F. 2d 950, 955, was presented with almost the identical questions now presented to this Honorable Court. The Court in that case held that

due process of law was violated by forcing the defendant to trial before a jury composed of jurors, every one of whom had sworn upon his voir dire examination that he had formed an opinion that the defendant was guilty. The Court stated in substance the trial court should have either sustained the defendant's motion to change the venue, or in the alternative have granted a continuance until such time as a fair and impartial jury could have been selected. (Defendant-Appellant's motions for continuance and change of venue were denied.)

A juror's mind should be free of any preconceived opinion as to the guilt or innocence of the accused or of the material facts and circumstances involved in the cause. *Fahnestock v. State* (1864), 23 Ind. 231, 236; *Wood's v. State* (1892), 134 Ind. 35, 40, 33 N.E. 901.

That certain of the jurors, as disclosed by the record, stated that they could disregard their preconceived opinions, indicates a recklessness of judgment and a state of mind less prepared to receive and allow a fair and impartial trial. *Scribner v. State* (1910), 30 Okla. Crim. 601; *People v. Barker* (1886), 60 Mich. 277; *State v. Huffman* (1931), 89 Mont. 194; *State v. Joiner* (1927), 163 La. 609, 112 So. 503.

It is obvious that when a prospective juror has already indicated to the court and/or counsel for either side, that he has a preconceived opinion as to the defendant's guilt, and upon questioning, evidences a biased and preconceived opinion unfavorable to the accused, the state, acting through its prosecuting attorney, in objecting to the defendant's challenge, acts to place a juror in an uncomfortable situation and unfavorable light. By psychological technique and pressure the court and prosecuting attorney attempt to make a prospective juror admit, not that he can lay aside the opinion completely, but that he will be fair and impar-

tial, and that the juror does not have a dishonorable feeling towards the accused. No man wishing to admit to dishonor before his fellow men, and the natural impulse being to defend one's integrity in open court, brings forth answers which should be given little credence or weight in view of the fact that most jurors afford greater respect to the prosecuting attorney and the court than to the defense counsel. *State v. Joiner* (1927), 163 La. 609, 112 S. 503, 505.

An interesting and enlightening comparison can readily be shown by the answers given during the voir dire examination of the jurors selected in *Juelich v. U. S.*, 214 F. 2d 950, 952; 953, and the answers given by jurors selected to serve in *State of Indiana v. Irvin* herein. Pertinent portions of the voir dire examination in Petitioner's cause are set out in this brief at pages 18-59.

Another interesting comparison can be made between the instant case and the *Juelich* case. From the *Juelich* record, it appears that 81 jurors composed the panel. Of these, 10 were excused, 51 testified that defendant was engaged in killing the officer, 12 were of the opinion that either the defendant or another had killed the officer, and 2 were of the opinion that Juelich was the guilty person, while 6 had no opinion. The statistics in the *Irvin* case herein reveal the following: 269 persons were successfully challenged for cause for fixed opinions concerning defendant-appellant's guilt; 103 persons were excused because of conscientious objections to the imposition of the death penalty; the Petitioner exercised and exhausted his 20 peremptory challenges; the State of Indiana exercised 10 peremptory challenges; 12 jurors and 2 alternate jurors were selected to serve; the remaining 15 persons were excused because of: deafness, 10; not a freeholder, 1; relative of Irvin, 1; attending funeral, 1; doctor's orders, 1; moved out of county, 1.

The total number of jurors thus interrogated was 431. The percentage of the persons in the community who were of the opinion that the defendant-appellant was guilty among those jurors interviewed soars higher, when it is considered that numbers of those who were excused because of conscientious objection to the imposition of the death penalty also had an opinion as to the guilt of the accused.

A juror's statement that he could set aside his preconceived opinion and thus become a fair and impartial juror is the mere statement of an opinion, and not of a fact, whereas the statement that he had a preconceived opinion is one of fact. *Lingafelter v. Moore* (1917), 95 Ohio 384, 117 N.E. 16, 17.

There is nothing in the record as to any juror who served that would indicate to the court that the later statement that the juror could act fairly and impartially is a statement more worthy of belief than the earlier statement that he could not act fairly and impartially. See *Johnson v. Reynolds* (1929), 97 Fla. 591, 121 So. 793, 796.

At first blush it appears that certain jurors may have made contradictory statements. Logically, however, it must be assumed that the juror is not actually taking a contradictory position. He can, on the one hand have an opinion, and if the evidence is diametrically opposed, disregard the opinion with hesitancy; but if the evidence meets the preconceived opinion, his mind is put at rest, and in good conscience he can justify his former opinion by saying he was fair and impartial, but the evidence was there just as he had expected.

In a capital case, such as the within cause, with human life depending upon the final outcome, the jury is presented with two questions;

FIRST: Has the defendant's guilt been established beyond a reasonable doubt?

SECOND: Is the penalty to be life imprisonment, or is the death penalty to be imposed?

It is of vital importance to the rights of the defendant that each of these questions be answered free from any bias, prejudice or pressure from the community as a whole. *People v. McKay*, (1951), 37 Cal. 2d 792, 236 P. 2d 145, 150.

In defendant-appellant's cause, he was charged with the murder of one Whitney Wesley Kerr. Newspapers, admittedly read by the jurors who served, referred to defendant-appellant as the confessed killer of six persons (Example, Tr. p. 79). The record is void of any evidence as to any other homicide. Thus, can one positively say that the result reached would not have been different if the defendant had been tried before jurors lacking the preconceived opinions expressed by them under oath, and void of the purported facts obtained from reading newspapers, listening to the radio and watching television?

The Federal courts, in determining whether or not defendant-appellant's liberty is being restrained in violation of the due process clause of the 14th Amendment to the Constitution of the United States, must determine whether or not the trial court acted arbitrarily and abused its discretion in overruling defendant-appellant's challenges for cause to those jurors who were of the preconceived opinion as to his guilt of the crime for which he was being tried. The question of the qualification of a juror is always a question to be decided by the reviewing courts. The trial court errs in permitting the juror himself to determine his qualifications. It is the discretion that has been exercised by the trial court that determines whether or not defendant-appellant is being illegally detained. *Juelich v. U. S.*

(5th Cir. 1954), 214 F. 2d 950; *Theobald v. St. Louis Transit Co.* (1905), 191 Mo. 395, 90 S.W. 354.

In addition to the jurors who admit that they had a preconceived opinion as to defendant-appellant's guilt, Juror Ernest Hensley testified in response to questions propounded him during the voir dire examination as follows:

"Q. Then you would presume, then, starting out on this trial, that the defendant was guilty until you heard evidence from him or from someone on his behalf of his innocence?

"A. Yes, sir.

"Q. So, in this particular case you would not enter into this matter and give the defendant the benefit of the doubt that he is innocent?

"A. That's right.

"Q. And, under those circumstances, it would be rather impracticable for you to render a fair and impartial verdict based solely upon the evidence?

"A. That's right" (Tr. pp. 3658-3659).

Johnson v. Reynolds (1929), 97 Fla. 591, 121 So. 793, 796 holds such a juror is incompetent.

Impartiality is not a technical conception. It is a state of mind. *U. S. v. Wood* (1936), 229 U.S. 123, 57 S. Ct. 177, 81 L. Ed. 78.

Constitutional right to a fair and impartial jury requires that every member of the jury must be fair and impartial towards the accused. *Lane v. State* (1925), 168 Ark. 528; *Coughlin v. People* (1893), 144 Ill. 140; 57 C.J.S. (Juries) Sec. 226a.

The burden of establishing the incompetency of a juror is not upon the defendant. In fact, the burden of proof rests upon the state to establish that a juror will be fair and impartial towards the accused, and any doubt as to the juror's competency should be resolved in favor of the accused. *In Re: Murchison* (1955), 349 U.S. 133, 75 S. Ct. 623; 99 L. Ed. 942; *Thompson v. Commonwealth* (1952), 193 Va. 704, 70 S.E. 2d 284. Thus, the jurors selected in Petitioner's cause were incompetent and their presence on the jury denied defendant-appellant due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

II.

Denial of Petitioner's Application for a Change of Venue Based Upon Bias and Prejudice in the Community in Which Trial Was Being Held Denied Petitioner Due Process of Law and the Application of Burns Indiana Statutes, Sec. 9-1305 Violates Due Process.

Burns Indiana Statutes, 1956 Replacement, Section 9-1305, Volume 4, Part 1, p. 157 provides:

"When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court * * * in all cases punishable by death, shall grant a change of venue to the most convenient county. * * * Provided, however, that only one (1) change of venue from the Judge and only one (1) change from the county shall be granted."

Petitioner filed three verified motions and affidavits for change of venue from Gibson County, Indiana. The first was filed on October 29, 1955 (Tr. p. 57), the second was filed November 14, 1955 (Tr. p. 127), and the third was filed

December 7, 1955 (Tr. pp. 297-298). Each motion was overruled by the trial court without granting defendant-appellant a hearing as prayed for by said motions, as shown by the transcript, at pages 57, 128, 129 and 284. The basis for the trial court's ruling can be found in the order book entry of the Gibson Circuit Court for the 29th day of October, 1955 (Tr. pp. 56-57). Quoting from the order book entry at page 57:

"And now the defendant files his motion and affidavit for change of venue from the county, and the court having judicial knowledge that this case is in this court on a change of venue from the Vanderburgh Circuit Court granted on the petition of the defendant, all as shown by the transcript in this cause now overrules said motion and affidavit for change of venue from Gibson County, Indiana. . . ."

A change of venue should be granted where a community is biased and prejudiced against the defendant. *Shepherd v. State of Florida* (1951), 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740; *Juelich v. U. S.* (5th Cir. 1954), 214 F. 2d 950; *People v. McKay* (1951), 37 Cal. 2d 792, 236 P. 2d 145.

The Indiana Supreme Court, although denying a second change of venue in *State ex rel. Fox v. LaPorte Circuit Court*, 1957, 236 Ind. 69, 138 N.E. 2d 875, two judges of the majority of three based their opinion upon the point that no attempt had been made as of the date of the decision to obtain a jury in the county of venue. The dissenting opinion of Judge Emmert, commencing at page 884, argued that the fact that the trial judge had found bias and prejudice in the community to be existent, the denial of the second change of venue would be in violation of the due process clause of the 14th Amendment to the Constitution of the United States. It was not too surprising that thereafter, a

second change of venue in the *Fox* case, *supra* was granted to the defendant, Robert Johnson, by the trial court upon the joint motion of the defendant and the State, and thereafter approved by the Indiana Supreme Court in *State ex rel. Gannon v. Porter Circuit Court*, 1959, — Ind. —, 159 N.E. 2d 713. It was Judge Achor, the author of the concurring opinion in *State ex rel. Fox v. LaPorte Circuit Court*, *supra*, who wrote the majority opinion approving a second change of venue in the same case where because of continued and additional publicity, another change of venue was filed, alleging that an impartial jury could not be selected in LaPorte County, Indiana, which facts were admitted by the prosecuting attorney. The Indiana Supreme Court, in reviewing the case of *State ex rel. Fox*, *supra*, and in refusing to apply the provisions of Burns Indiana Statutes Annotated, Section 9-1305, *supra*, in effect overruled *State ex rel. Fox v. LaPorte Circuit Court*, *supra*, and held same inapplicable where the defendant could not have a fair and impartial trial in the community because of bias and prejudice against the defendant.

The Court of Appeals for the Seventh Circuit lays great stress upon the impartiality of the trial judge, but the majority opinion ignores the fact that the trial judge was not the *trier of fact*.

Due process of law requires that the trier of fact be free of any bias or prejudice against the defendant, regardless of the personal opinion of the trial judge, who under our procedure is not permitted to comment upon the evidence or to express in any way his personal views as to the guilt or innocence of defendant.

It would be difficult to find a holding more prejudicial to the rights of an accused as guaranteed by the 14th Amendment to the Constitution of the United States, than the holding in *State ex rel. Fox*, *supra*. Judge Bobbitt, speaking for the majority, stated at 138 N.E. 2d 875, 880,

that the Indiana Constitution, which guarantees trial by an impartial jury, cannot be construed to mean "that the accused may have a trial by an impartial jury in a county adjoining that in which the offense was committed," but the right is limited to those counties where the offense is actually committed. And in the same opinion, he wrote: "There is no question of weighing the evidence presented in the hearing on a motion for change of venue from La-Porte County involved in this case."

It is with this same erroneous thinking that the Court of Appeals has erred in the instant case, and that Court has ignored the fact that this Petitioner was denied a hearing of any kind on his motions, both for a change of venue and for a continuance, and therefore it made no difference to the trial judge what the evidence would have been had he afforded this Petitioner a hearing, for standing on the statute alone, he denied the motions. Certainly, it is not too much to ask of a trial court that in affording a fair and impartial trial to an accused as guaranteed by the 14th Amendment to the Constitution of the United States, that he give the accused an opportunity to present the facts at a hearing, and based upon those facts, to render a decision. And as in this case, where day after day, prospective jurors expressed the opinion that this Petitioner was guilty (samples of their answers given on the voir dire being set out in this brief), there remained in the jury box a jury composed of over half in number who were of the opinion that this Petitioner was guilty of the offense for which he was being tried.

The trial judge, under these circumstances, had only two choices: To grant Petitioner's motion for continuance, or to grant Petitioner's motion for change of venue from the county.

III.

The Overruling of Petitioner's Motions for Continuance Based Upon the Bias and Prejudice in the Community Constituted Denial of Due Process of Law.

The voir dire examination of the 431 prospective jurors called in this case leads to the undeniable conclusion that Gibson County, Indiana, was a biased and prejudiced community with regard to Petitioner on November 14, 1955, when an attempt was made to impanel a jury in this cause. That it required 431 prospective jurors to be called is proof in itself, and the strongest evidence which can be presented in support of a motion for continuance. But in addition to this strong evidence, there was other evidence presented to the court by way of answers to questions propounded to prospective jurors as to whether or not they had formed or expressed an opinion as to Petitioner's guilt.

Petitioner filed several motions for continuances, including a motion filed on the 14th day of November, 1955 (Tr. p. 130). Additional verified motions for continuance were filed on November 15, 1955 (Tr. p. 155), on November 16, 1955 (Tr. p. 162), on November 17, 1955 (Tr. p. 171), on November 18, 1955 (Tr. p. 173), on November 21, 1955 (Tr. p. 187), on November 22, 1955 (Tr. p. 201), and the final motion on December 5, 1955 (Tr. p. 243).

Each motion was overruled as shown by the record, Transcript pages 127, 154, 161, 170, 178, 187, 200 and 242. By each motion Petitioner prayed for a hearing in order to introduce evidence in support of the allegations contained therein, that he could not have a fair and impartial trial in Gibson County, Indiana, because of the bias and prejudice then existent in said community against Petitioner. The verified motions for continuance stand undenied by the

record in the proceedings in the Gibson Circuit Court. No answer was ever filed to any of said motions and no hearing held on any of said motions. Prosecuting Attorney Paul B. Wever openly admitted on the outside of the courtroom, however, the great difficulty encountered in obtaining a jury because of the bias and prejudice against the Petitioner. In fact, during the course of the proceedings below, he appeared on a radio news broadcast on the 22nd day of November, 1955, and while the voir dire examination of prospective jurors was in process (Tr. p. 253)., (Brief pp. 17-18) The prosecuting attorney, during the course of the news broadcast, remarked:

"I think probably the most unusual thing in this case is the unusual coverage given to the case by the newspapers and radio. This is what has caused us so much trouble in getting a jury of people who are not unbiased and unprejudiced in the case" (Tr. p. 253).

And in response to the question:

"You mean the coverage of the thing that has gone on before the actual trial?"

Prosecutor Wever replied:

"That is right" (Tr. p. 253).

The answers of prospective jurors during their voir dire examination are equally strong evidence of the bias and prejudice which then existed. Excerpts from testimony on voir dire examination of various prospective jurors are:

Prospective Juror Williams:

"The opinion I have expressed was that he was guilty" (Tr. p. 3822).

Prospective Juror Coleman expressed an opinion that the defendant was guilty (Tr. p. 3831).

Prospective Juror Edwards:

"Well, from what I have heard it would still be the death penalty" (Tr. p. 3921).

Prospective Juror Yarbor:

"I don't believe there would be enough to remove it in my mind" (Tr. p. 3966).

Prospective Juror Clem:

"I believe the guilty finger points at him" (Tr. p. 4156).

Prospective Juror Bates:

"I think he is guilty" (Tr. p. 4186). "It would require a whole lot of evidence to remove my opinion" (Tr. p. 4187).

Prospective Juror Bammer:

"Q. Whether or not you have formed or expressed an opinion as to defendant's guilt or innocence?

"A. Yes, sir, I have (Tr. p. 4238). I don't think you could get enough evidence to remove my opinion" (Tr. p. 4239).

Prospective Juror Schlotman:

"I have got my mind already made up" (Tr. p. 4276).

Prospective Juror Brown:

"Q. Whether or not you have formed an opinion as to the defendant's guilt or innocence?

"A. Yes, sir" (Tr. p. 4287). "It would have to be awful good evidence to remove my opinion" (Tr. p. 4289).

Prospective Juror Baize:

"I absolutely have an opinion" (Tr. p. 4380).

Prospective Juror Ben Gries:

"They ought to take him out and do what he had been doing" (Tr. p. 2179).

Prospective Juror Hipp:

"Well, the evidence too. After you kill one man, you don't have to kill again, do you?" (Tr. p. 2205)?

Prospective Juror Hulfacher:

"Yes, sir, it is a fixed opinion. Yes, sir, I believe he's guilty and don't believe we need them kind of people around" (Tr. p. 2280).

Prospective Juror Fella:

"Based upon just taking him out and hanging him, I believe" (Tr. p. 2582).

Prospective Juror Walters:

"Well, the first reason was he confessed, and the second reason was if he wasn't guilty the policemen wouldn't give up the search for the guilty man. Another reason is there has been no more killings like this" (Tr. p. 2461).

Prospective Juror Faust:

"I think he is guilty, from what I've formed my opinion" (Tr. p. 3493).

Prospective Juror Wolfe:

"Well, that's the way I feel about that. If a man is guilty of murder, the death penalty is the worst, I

think he could get and I think he would be lucky if he got anything lighter, and if the man was guilty of murder, in my opinion he should have the works" (Tr. pp. 2259-60).

These examples taken from the voir dire examination are indicative of the attitude and atmosphere which prevailed during the voir dire examination and during the course of the trial. The voir dire examination covers the greatest portion of the transcript in said cause on appeal to the Supreme Court of Indiana, which Petitioner introduced in evidence without objection at the hearing on his petition for writ of habeas corpus in the Northern District Court of Indiana, South Bend Division. The voir dire examination covers pages 1979 to 4762 inclusive of the transcript.

In *Juelich v. U. S.* (5th Cir. 1954), 214 F. 2d 950, the Court was of the opinion that where large numbers of prospective jurors and jurors were of the preconceived opinion as to defendant's guilt, a continuance should have been granted.

The Indiana Supreme Court in an opinion by Judge Gilkinson, took the position that a continuance should be granted where prejudicial newspaper stories have been disseminated prior to trial and it appears reasonably probable that a defendant will be prejudiced by the denial of a continuance. *Liese v. State* (1954), 233 Ind. 536, 213 N.E. 2d 731, 732.

Judge Parkinson in *Irvin v. Dowd* (1957), 153 Fed. Supp. 531, 536, recognized that at the time of the hearing on Petitioner's petition for writ of habeas corpus on July 5, 1957 at South Bend, Indiana, the proceedings connected with Petitioner's case continued to have state-wide publicity. Petitioner most earnestly takes issue, however, with Judge Parkinson's statement with reference to the publicity attendant to Petitioner's cause, wherein he stated:

“ * * * It therefore made no difference where or when the petitioner had been tried. It would have been the same.”

It is significant that Judge Parkinson, sitting at the hearing on Petitioner's petition for writ of habeas corpus, some 275 miles from the City of Princeton, in Gibson County, Indiana, where the trial of Petitioner's cause was held, made the finding of fact that “It therefore made no difference where or when the Petitioner had been tried. It would have been the same.”

And likewise, Chief Justice Duffy's concurring opinion in *Irvin v. Dowd*, *supra*, at page 554, wherein he stated:

“Probably it was as impartial as could be found in Gibson County on that date, but that was not sufficient to insure due process.”

It is no consolation to Leslie Irvin for the courts of the United States to say in effect: “We are sorry, but there was no place in Indiana where you could have had a fair trial. The news media created a situation about which we, the courts, can do nothing.” Petitioner here urges that the courts have a concurrent obligation to the accused to protect the accused, and require that news media be controlled in their efforts towards “Trial by Press” prior to trial. The courts should not shirk their responsibility towards the accused in this regard.

The Supreme Court of the United States has at all times attempted to protect the right of newspapers to make and publish comments either “vitriolic,” “scurrilous” or “erroneous” concerning pending litigation, without thereby risking conviction for contempt of court, *Bridges v. California* (1941), 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192; *Pennekamp v. Florida* (1946), 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed.

1295; *Craig v. Harney* (1947), 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546, and even in these extreme cases, this has been a divided Court.

The Supreme Court of the United States having guaranteed Constitutional protection for the press to report and comment on pending litigation, it is important now that this Court recognize and re-affirm the correlative constitutional right of individuals charged with crime to be protected from the results of the abuse of that power referred to as Freedom of the Press. The concept of due process of law concerns itself most dearly with the rights of an accused to a fair and impartial trial. This Court must now recognize the media of mass communication, in the exercise of their fundamental freedom to disseminate the news, can infringe upon the rights of an accused in a criminal cause, preventing a fair and impartial trial.

Under our American system of law, there is no way that the courts can silence newspapers, radio and television and their treatment of criminal causes in the absence of a "serious and imminent threat to the administration of justice." *Craig v. Harney* (1947), *supra*, 67 S. Ct. 1249, 1253.

But this should not mean that the press, radio and television, unimpeded by any restraint, should have the right to try a defendant in the news media by evidence, pictures, confessions, prosecutor's statements, etc. without affording some protection to the defendant, who is in custody and unable to counteract or gain equal space to answer or counteract trial by newspaper.

In *Shepherd et al. v. State of Florida* (1951), 341 U.S. 50, 71 S. Ct. 549, 550, 95 L. Ed. 740, Justices Jackson and Frankfurter recognized the possibility of a newspaper preventing a defendant from having a fair and impartial trial by reason of their published reports, and stated:

"It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here just such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury.

" * * * But if freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law."

In *Stroble v. California* (1952), 343 U.S. 181, 72 S. Ct. 599, 609, 96 L. Ed. 529, Justice Frankfurter criticizes inflammatory pre-trial releases by a prosecutor. In view of Prosecuting Attorney Wever's active participation in the selection of the jury, examination of witnesses and in presenting final arguments to the jury, his conduct prior to the trial becomes all the more important and significant, for it is the newspaper articles which carried stories and quotes from Mr. Wever that are partially the basis for the disqualification of large numbers of jurors and for the disqualification of the jurors urged in this brief. Quoting from Mr. Justice Frankfurter's opinion in the *Stroble* case:

"And so I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of 'the traditional concept of the "American way of the conduct of a trial"'. Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the

orderly course of justice. To allow such use of the press by the prosecution as the California court here left undisciplined, implies either that the ascertainment of guilt cannot be left to the established processes of law or, impatience with those calmer aspects of the judicial process which may not satisfy the natural, primitive popular revulsion against horrible crime but do vindicate the sober second thoughts of a community. If guilt here is clear, the dignity of the law would be best enhanced by establishing that guilt wholly through the processes of law unaided by the infusion of extraneous passion. The moral health of the community is strengthened by according even the most miserable and pathetic criminal those rights which the Constitution has designed for all."

In the *Stroble* case this Court failed to find sufficient evidence to substantiate the claim that newspaper accounts of the murder for which the defendant was tried or newspaper accounts of his confession had aroused the community against said defendant to such an extent as to prevent a fair trial in violation of the due process clause of the 14th Amendment. There are some clearly defined distinctions between the within cause and the *Stroble* case. In the *Stroble* case there were no motions for continuance or change of venue; the defendant did not exhaust his peremptory challenges, and the confession printed in the newspaper was a public record as a result of the preliminary hearing conducted prior to trial, and finally, the record fails to disclose that any of the jurors in that case had read or otherwise discussed the newspaper articles.

And again, the Court in dealing with this question in *United States v. Handy* (1956), 351 U.S. 454, 76 S. Ct. 965, 100 L. Ed. 1331, found it significant that the petitioner in a habeas corpus proceeding, although represented by

competent counsel, did not use all of his peremptory challenges, did not seek a continuance of the trial, or a change of venue. Although not holding the failure to exercise these means controlling, the Court did deem the failure to exercise them significant. Citing *Stroble v. California, supra*.

In *U. S. v. Handy, supra*, in 76 S. Ct. 965, 973, Justice Harlan dissented, with Justices Frankfurter and Douglas joining. They would hold that due process was violated because a small rural community was outraged over the atrociousness of the crime charged, and in a capital case, the actions and comments outside the court room by a disqualified trial judge, and in his making his presence known in the court room during the course of the trial, might easily have been representative of the feelings of the community, and of vital importance to those jurors who fixed the penalty of death. This, in the opinion of Justices Harlan, Frankfurter and Douglas, was sufficient to have warranted the granting of a writ of habeas corpus.

In *State of Maryland v. Baltimore Radio Show* (1950), 338 U.S. 912, 70 S. Ct. 252, 255, 94 L. Ed. 255, Justice Frankfurter in an opinion regarding the Supreme Court's denial of the petition for writ of certiorari to review a decision of the Court of Appeals, reviewing a conviction of a radio station operator for contempt of court for publishing the gruesome details of the murder of a little girl in a park, prior to the trial, said:

"The issues considered by the Court of Appeals bear on some of the basic problems of a democratic society: Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for

adjudication. It has taken centuries of struggle to evolve our system for bringing the guilty to book, protecting the innocent, and maintaining the interests of society consonant with our democratic professions. One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible. It would be the grossest perversion of all that Mr. Justice Holmes represents to suggest that it is also true of the thought behind a criminal charge. * * * that the best test of truth is the power of the thought to get itself accepted in the competition of the market. *Abrams v. United States*, 250 U.S. 616, 630, 40 S. Ct. 17, 22, 63 L. Ed. 1173. Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge."

Attached to Justice Frankfurter's opinion are numerous English decisions, wherein the English courts were concerned with the contemptuous nature of published articles prejudicial to the fair administration of criminal justice. Although admittedly these cases are not controlling in this country, they are fundamental to the question here presented.

The American Bar Association has recognized the seriousness of the problem presented to the courts by trial press. See *Report of the Special Committee on Cooperation Between the Press, Radio and Bar, as to publicity*

interfering with fair trial of judicial and quasi-judicial proceedings.

62 A.B.A. Rep. 851 (1937).

In *Delaney v. U. S.* (1952) (1st Cir.), 199 F. 2d 107, 3 A.L.R. 2d 1300, a former internal revenue officer was charged with receiving payments with the intent of having his official actions and decisions influenced and with making false certificates of discharge of tax liens. While under indictment, and awaiting trial for the alleged offenses, the King Congressional Committee conducted highly publicized hearings in Boston, where the trial was to be held. Defendant's motions for continuance of the trial were denied. The United States Court of Appeals for the First Circuit in an opinion by Chief Justice Magruder, held that the damaging publicity resulting from the hearing constituted grounds for continuance of the trial until its prejudicial effect had had an opportunity to wear off. Contrary to the *Handy* and *Stroble* cases, the Court held that defendant's right to a continuance was not waived by the defendant's failure to avail himself of the right to a change of venue or to exhaust his peremptory challenges during the voir dire examination. Justice Magruder, in commenting upon the average juror's inability to overcome the prejudicial effects of such intense publicity said:

“One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconception as to probable guilt, engendered by pervasive pretrial publicity.”

And the Court was unwilling to follow the fatalistic acceptance of “trial by newspaper” as being “an unavoidable curse of metropolitan living (like, I suppose, crowded sub-

ways)" as advanced by Justice Frank's dissenting opinion in *U. S. v. Leviton* (2nd Cir. 1951), 193 F. 2d 848, 865.

In most cases which have dealt with the continuance-due process question as presented here, there has been an absence of a concrete showing by the appealing party of bias and prejudice on the part of the jurors who served, or a complete absence of any evidence that the jurors selected had read or heard anything about the particular case in the newspapers and from the radio and television reports, to form the foundation for community bias and prejudice complained of. However, in the instant case, counsel for Petitioner were able to establish throughout the voir dire examination that the jurors, over an extended period of time had read the articles concerning Petitioner as published by the Evansville Courier and the Evansville Press, as well as those articles printed by the Princeton Clarion-Democrat and reports they had heard over the Evansville radio and television stations. The evidence as presented by Petitioner's motions for continuance was that over an extended period of time, including immediately prior to the trial, these newspapers had carried front page stories concerning Petitioner and made reference to him as "the confessed killer of 6 persons." It is submitted that the evidence in this cause clearly establishes actual bias and prejudice in Gibson County, Indiana, where Petitioner's trial was held, and among prospective jurors called in said cause, and jurors who actually served, on account of the newspaper, radio and television reports, to such an extent that Petitioner-Appellant has been deprived of a fair and impartial trial as guaranteed by the due process clause of the 14th Amendment to the Constitution of the United States. Even though a decision such as this is a matter of degree, under this evidence this Court can only conclude that due process has not been afforded Petitioner. Cf.

Moore v. Dempsey (1923), 261 U.S. 86, 43 S. Ct. 263, 67 L. Ed. 543.

Attached to each of Petitioner's motions for continuance were sample articles, and by no means all of the articles published by the aforementioned newspapers concerning Petitioner and indicating his guilt.

The news articles covering the killing of Whitney Wesley Kerr commenced in December of 1954. However, until April 8, 1955, the date petitioner was arrested, Petitioner's name was in no way ever linked with the slaying. Although under arrest on April 8, 9 and 10th, 1955, the first news article of significance herein appeared on Monday morning, April 11, 1955, when the Evansville Courier in headlines stated (Tr. p. 67):

"MURDER SUSPECT FACES LIE TEST TODAY"

"HELD INCOGNITO AS PAROLE VIOLATOR"

Subsequently the Evansville Courier printed these headlines (Tr. p. 68):

"POLICE PRESS PROBE OF MURDER SUSPECT"

**"IRVIN REGARDED AS HOT LEAD
AFTER LIE TEST"**

**"State Police Mum on Full Report, but Confessed
Burglar's Clothes Sent to Lab in Duncan Slayings"**

Likewise, the Evansville Press (Tr. p. 70) in headlines stated:

**"IRVIN PLACED AT MURDER SCENE:
REPORTED SEEKING TO MAKE DEAL"**

**"CAR SEEN TURNING
INTO DUNCAN LANE"**

And in the Evansville Courier (Tr. p. 72):

**"IRWIN, GRILLED
IN MURDERS, TO
TALK TO WEVER"**

**"Parolee, Suspected in Area
Slayings, to Confer with
Prosecutor at 9 A.M. Today"**

And in headlines 2 $\frac{3}{8}$ inches high, the Evansville Courier
blasted across the front page (Tr. p. 73):

"SIX MURDERS SOLVED!"

**"REPORT DETAILS
OF HOW KILLINGS
WERE EXECUTED"**

**"POLICE CHARGE IRVIN
WITH KERR SLAYING:
IMPLICATED IN OTHERS"**

**"Prosecutor to Ask for Grand Jury
Action Today: Ex-Convict Still
Refuses to Write Out Confession"**

Our Comment: Following these headlines, the entire front
page of this newspaper was devoted to details of how each
of six deceased persons were purported to have been
murdered by Petitioner.

The Evansville Press, on April 14, 1955 (Tr. p. 74) in
headlines stated:

**"GRAND JURY CALLED
IN IRVIN CONFESSION"**

**"TRUCKER SOUGHT
TO IDENTIFY SLAYER"**

**"Admitted Killer of Six Area Persons
Spends 25 Minutes Talking with Priest"**

The Evansville Press, on April 14, 1955 (Tr. p. 76) posed the question in headlines:

"WHAT MADE IRVIN A KILLER?"

And the Evansville Press on the same date related the details of the story of six murders (Tr. p. 77):

Also in the Evansville Press (Tr. p. 78) these headlines:

**"BURGLARIES WOVE
NET AROUND IRVIN"**

The Evansville Courier again on April 15, 1955 (Tr. p. 79) came out with headlines:

**"MASS-KILLER LESLIE IRVIN BARES DETAILS
OF SIX AREA SLAYINGS TO LOCAL POLICE"**

**"CONFESSIONS END
SIX-DAY SILENCE"**

Subsequent significant headlines were as follows:

**"NO IRVIN DEAL,
WE ASK DEATH,
ASSERTS WEVER"**

(Tr. p. 80)

"IRVIN INDICTED ON TWO MURDER CHARGES"

(Tr. p. 93)

**"TWO DOCTORS
DECLINE TASK
TESTING IRVIN"**

(Tr. p. 101)

"DOCTORS SAY IRVIN CAN STAND TRIAL"

(Tr. p. 103)

**"IRVIN SANE;
FACES TRIAL"**

(Tr. p. 105)

The Evansville Press went so far as to print the following comment (Tr. p. 92):

"Mr. Hayes' appointment as counsel for Irvin is mandatory and he had no choice but to accept.

"Mr. Hayes disclosed today he has received much criticism over being Irvin's counsel. He pointed out that not only must the public defender represent all persons for whom the court appoints him, but the law requires that every person charged with a felony must have an attorney if he wants one.

"An Attorney is subject to disbarment for refusing to represent an accused, he added."

On Transcript p. 97, in referring to defendant's plea of not guilty, the Evansville Press had this to say:

"Leslie Irvin, who has admitted to police that he shot six persons to death to cover up three petty robberies, pleaded innocent."

On the day before trial, the Evansville Courier-Press stated (Tr. p. 135):

"Evansville police say Irvin has orally admitted the Kerr, slaying; the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County and the slaughter of three members of the Duncan family in Henderson County, Ky."

On the date of the trial, the Evansville Courier referred to Irvin as an ex-convict who served time in the Indiana penitentiary for burglary (Tr. p. 134).

The Evansville Press in a similar vein stated (Tr. p. 137):

"Although police have no written statement, they said Irvin has already admitted shooting Mr. Kerr, a 29 year old service station attendant, while robbing the station Dec. 23, 1954.

"Irvin, whose Evansville address is 1224 E. John St., also orally admitted the robbery-murder of Mrs. Mary Holland, police said. They said he also admitted the slaying of three members of the Duncan family in Henderson County, Kentucky, and the murder of Mrs. Wilhelmina Sailer, in Posey County."

The Evansville Courier, several days prior to trial stated (Tr. p. 138):

"Police who arrested him say Irvin has confessed to six murders in two states, ranging over a period of four months, and the convicted burglar will go on trial Monday for only one, in Evansville. . . .

"In oral statements given police after his arrest, Irvin said he first slugged Mrs. Holland into unconsciousness, then shot her in the head when she came to and screamed as he was taking money from the store.

Robbed Station

"He said he shot Kerr, attendant at a service station on the corner of U.S. 41 and Franklin Street, and robbed the station after talking with the 20 year old father of three from 10 p.m. to 1 a.m. Dec. 23, 1954.

"Police say Irvin also has admitted murdering Mrs. Wilhelmina Sailer, a Posey County housewife; Goebel Raymond and Elizabeth Duncan, all of Henderson County, Ky., and leaving for dead Mrs. Goebel Duncan, whom he shot in the head."

During the voir dire examination, Joe Aaron, Feature writer for the Evansville Courier described the selection of the jury as follows:

"Strong feelings, often bitter and angry, rumbled to the surface Tuesday as the selection of a jury to weigh the fate of Leslie Irvin crawled through its second laborious day" (Tr. p. 166).

Later Mr. Aaron commented:

"The extent to which the multiple murders—three in one family—have aroused feelings throughout this area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions in the case" (Tr. p. 192).

Later he wrote:

"Events preceding the defense motion Monday followed the pattern previously laid down in the trial—a pattern of deep and bitter prejudice against the former pipe-fitter" (Tr. p. 206).

For the Evansville Press, a well known reporter, Robert Flynn, wrote:

"OUTBURSTS SPARK IRVIN JURY PICKING"

"The outbursts, however, highlighted the difficulties which the defense attorneys, along with the prosecuting attorneys—Prosecutor Paul Wever and Deputy Howard Sandusky from Vanderburgh County, and Prosecutor Loren McGregor, from Gibson County are having" (Tr. p. 176).

At Transcript page 193 he comments upon the spectators as a result of juror's statements, as "my mind is made up" and "I think he is guilty."

And at Transcript page 207 he writes:

"IMPARTIAL JURORS ARE HARD TO FIND"

IV.

Denial of Hearing on Motions for Continuance and Change of Venue Constituted Denial of Due Process.

The 14th Amendment to the Constitution of the United States guarantees a defendant in a criminal case a fair trial before a fair tribunal.

In Re: Murchison (1955), 349 U.S. 133, 75 S. Ct. 623, 625, 99 L. Ed. 942.

In the instant case the defendant-appellant, at each and every step of the proceedings was denied a hearing on his verified motions and affidavits for change of venue and for continuance. The record is clear that no answer was ever filed to any of these motions filed on behalf of defendant-appellant; that no hearing was ever held on any of these motions. The guarantee of due process is of no value, if defendant-appellant is denied the opportunity to present evidence in support of his motions for continuance and change of venue, and in fact, the Supreme Court of Ohio in *Moore v. State* (1928), 118 Ohio 494, 161 N.E. 532, 533, in holding that due process required that the affidavit of prejudice made against a presiding judge in a criminal case, required the judge to hold a hearing and permit the defendant to make such record as would be necessary so that the reviewing court could determine whether or not the defendant has been afforded a fair and impartial trial before a fair and impartial tribunal. Quoting from the court's opinion at page 533:

"We would not hold that a frivolous and unsupported claim of bias or preconceived judgment on the part of

the judge or magistrate would ipso facto disqualify the judge, but we are unqualifiedly of the opinion that any one who asserts such a claim should be afforded an opportunity to support the claim by the introduction of testimony. While it would not be the duty of the judge to tamely submit to unfounded imputations upon his integrity, he should at least permit a record to be made, so that a reviewing court may determine whether or not there has been a trial before an impartial tribunal."

The Supreme Court of Oregon in *State v. Biggs* (1953), 198 Ore. 413, 255 P. 2d 1055, 1060, in holding unconstitutional under the 14th Amendment to the Constitution of the United States, the Oregon statute permitting change of venue only in felony cases, recognized that an entirely different situation would have been presented in that case had the trial court granted a hearing on the petition for change of venue from which a record could have been made, subject to review by the appellate court, but the denial without a hearing, based upon the aforementioned statute constituted violation of due process of law.

In 16A C.J.S. (Constitutional Law) Section 591, p. 1185, the rule is stated:

"The process of law in a criminal case requires not only a trial or hearing before judgment and condemnation, but also a fair and impartial trial or hearing according to the due and orderly course of the law.
 . . . " (Our emphasis.)

In *State ex rel. Fox v. LaPorte Circuit Court* (1956), — Ind. —, 138 N.E. 2d 875, dissenting opinion by Justice Emmert, p. 884, approves the conducting by a court of a hearing, even though the Indiana statute permits only one change of venue from the county in a capital case, and

where the court found bias and prejudice existed, he would hold the Indiana statute unconstitutional as a denial of due process of law.

Courts by their very nature have the inherent power to do everything reasonable and necessary to carry out the purposes for which they are created, and must exercise every reasonable effort to protect the rights of an accused. *Knox County Council v. State ex rel. McCormick* (1940), 217 Ind. 493, 29 N.E. 2d 405, 407, 130 A.L.R. 1427.

Petitioner offered to prove the facts and allegations set forth in his motions for continuance and change of venue, and the State of Indiana at no time denying the facts and allegations as set forth in the motions, and the Court having heard no evidence, this Court must assume that the facts and allegations contained in the motions and offer to prove are true. *Lambert v. People* (1957), 355 U.S. 225, 78 S. Ct. 240, 242, 2 L. Ed. 2d 228.

V.

Trial Court's Refusal to Permit Petitioner to Introduce Evidence Including His Own Testimony in Support of His Offer to Prove the Involuntary Nature of a Purported Confession Prior to Its Introduction Into Evidence Denied Petitioner Rights Guaranteed Under the Due Process Clause of the 14th Amendment to the Constitution of the United States.

During the course of the proceedings, the following question was propounded by the prosecuting attorney to Dan Hudson, Chief of Detectives of the Evansville Police Department. Said question is as follows:

"Q. What, if anything, did the defendant say to you about the murder of Whitney Wesley Kerr when he

talked with you on Tuesday, April 12, 1955?" (Tr. p. 1615):

Petitioner at the time duly and timely objected to said question (Tr. p. 1615). The objection to said question covers pages 1615 to 1623 of the transcript (Brief pages 60-67), and in substance is an objection based upon the illegal arrest of Petitioner; that he had been detained by police officers for an unreasonable time after his illegal arrest and before any purported confession, without being taken before any committing magistrate or hearing judge; that he was not advised of his right to remain silent; that he was questioned for long and prolonged periods of time; that upon arresting Petitioner police officers held the defendant incognito for a period of seven days, submitting him to relentless questioning; that he was denied proper sleep and rest, and was not provided with proper food; that the purported admission or confession, if any, was illegally and unlawfully obtained by force and violence, and in violation of Petitioner's rights as guaranteed by the Constitution and laws of the State of Indiana, and by the due process clause of the 14th Amendment to the United States Constitution, and in addition to alleging the facts and circumstances surrounding the coerced nature of any purported admission or confession, the Petitioner asked leave of court to introduce evidence in support of said objection, and offered to prove facts and circumstances set out in said objection (Tr. p. 1623).

Thereafter the court overruled said objection and denied Petitioner the opportunity or right to introduce evidence in support of his objection (Tr. p. 1623).

The witness, Dan Hudson, was then permitted to answer said question, which answer was as follows:

"A. He told me that he had shot and killed Wesley Kerr" (Tr. p. 1623).

By reason of the ruling of the trial court, Petitioner herein was denied the right to call witnesses in his own behalf and to introduce evidence as to the involuntary nature of any purported confession. That said ruling and procedure of the court was in direct violation of the due process clause of the 14th Amendment to the Constitution of the United States.

The constitutional right afforded to a defendant in a criminal proceeding means the right to be heard at the proper time, and is not satisfied by so postponing the right as to make it in whole or in part ineffective or to a time when to avail of it entails the acceptance of conditions which may not lawfully be imposed upon an accused. Denying Petitioner the right to introduce evidence and produce witnesses at the time of the objection constituted a violation of due process. *In Re: Murchison* (1955), 349 U.S. 133, 75 S. Ct. 623, 625, 99 L. Ed. 942; *English v. State* (1949), 206 Miss. 170, 30 So. 2d 876, 877.

A confession based in whole or in part upon a confession obtained under circumstances as set forth in Petitioner's objection and offer to prove (Tr. pp. 1615-1623) violates due process. It is not necessary to determine whether the other evidence in the record is sufficient to justify the conviction. That the admissions and confessions were illegally and unlawfully obtained prevent the use thereof in a state court proceeding. *Watts v. Indiana* (1949), 338 U.S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801; *Malinski v. New York* (1945), 324 U.S. 401, 65 S. Ct. 781, 783, 89 L. Ed. 1029; *Williams v. North Carolina* (1942), 317 U.S. 287, 63 S. Ct. 207, 208, 87 L. Ed. 279.

The court's ruling in Petitioner's case clearly violated his constitutional rights and was, to say the least, inconsistent, for during the course of the proceedings at tran-

script page 1296, the following question was asked officer Dan Hudson by the State:

"Q. What did Leslie Irvin say to you on or about April 8 at the time you have just testified, regarding the homicide of Wesley Kerr?"

The Petitioner filed an objection to said question, made an offer to prove, and the court heard evidence relating to the voluntary or involuntary nature of a purported admission or confession made at said time, if any, and the circumstances under which said statement was obtained. Thereafter the court overruled said objection and the witness was permitted to answer the above question:

"A. On April 8 he denied killing Wesley Kerr" (Tr. p. 1614).

It is impossible to conceive of any situation where the circumstances and conditions surrounding the taking of a purported confession would be the same on April 12 as they had been 5 days prior thereto, on April 8. See 16A, C.J.S. (Constitutional Law) Sections 579, 591.

In the case of *U. S. v. Carignan* (1951), 342 U.S. 36, 2 S. Ct. 97, 96 L. Ed. 48, the question was presented where the court erred in refusing to permit the respondent to take the stand and testify in the absence of the jury to facts believed to indicate the involuntary character of his confession. In this particular case the Government made no objection to the reversal of the conviction on that ground, and this Court stated:

"We think it clear that this defendant was entitled to such an opportunity to testify. An involuntary confession is inadmissible. Such evidence would be pertinent to the inquiry on admissibility and might be

material and determinative. The refusal to admit the testimony was reversible error."

In the instant case the Petitioner was denied the right to testify for and on behalf of himself, and to call witnesses to support his offer to prove, all of which would be in violation of his constitutional rights.

VI.

Permitting Prosecuting Attorney to Participate in the Voir Dire Examination of Prospective Jurors, in the Examination of Witnesses, to Testify as a Witness as to a Purported Confession and to Then Comment on His Own Testimony in the Closing Argument is Unethical, Morally Wrong and Violates Due Process.

Paul B. Wever at the time of trial was prosecuting attorney for the First Judicial Circuit of Indiana, which is Vanderburgh County, Indiana. This cause was venued to the nearby community of Gibson County, Indiana, where Mr. Wever was appointed as a special prosecuting attorney by Judge A. Dale Eby, Judge of the Gibson Circuit Court, for the purpose of prosecuting the case of State of Indiana versus the Appellant herein. Mr. Wever was acting in the many and varied phases of the proceedings in this case, commencing with the giving of news releases to the various news media, presenting facts to the grand jury upon which an indictment was returned in this cause, arraignment, etc. During the course of the voir dire examination of jurors, he participated in the examination of the prospective jurors, made objections to challenges for cause by the defendant-appellant herein and in the presence of the prospective jurors, argued on behalf of the State on questions of law. After the jury was selected, Mr.

Wever examined the witnesses during the course of the evidence as presented by the State of Indiana in its case in chief. Included in the State's case in chief was the testimony of the same Mr. Wever, who was sworn as a witness and testified concerning the purported oral confession made to him by this defendant-appellant. At the close of the evidence, and over defendant-appellant's objections, Prosecuting Attorney Wever was permitted to make a closing argument to the jury, and during the course of his closing argument he argued, and was permitted to argue in support of matters he himself had testified to under oath (Tr. p. 4773).

It was not surprising therefore, when this cause was argued before this Honorable Court on January 15, 1959, that the same Witness-Prosecuting Attorney was present in the chambers of this Honorable Court, and available to answer any questions by this Court.

Such conduct on the part of a prosecuting attorney is, on its face, offensive to the rights of a defendant to a fair and impartial trial. It permits the prosecuting attorney, as a key factor in the trial of a criminal cause, and the director of the introduction of evidence, through his actions in the trial, towards witnesses, other participants in the trial, towards the jurors themselves, to gain the confidence of the jury as no other witness could achieve or even have the opportunity of achieving. Mr. Wever, as prosecuting attorney, was and is an advocate. A witness belongs to no one. He should stand impartial before the bar of justice, ready to testify as to the facts for which he is called to testify as a witness. Mr. Wever, as prosecuting attorney, was obviously prejudiced against the defendant-appellant, and vitally interested in obtaining a conviction against him. It cannot be questioned that his testimony, or actions as prosecuting attorney were influenced by his desire to obtain a conviction.

Canon 19 of the Canons of Professional Ethics of the American Bar Association clearly defines the duties owed by an attorney to the parties and to the court, where circumstances arise which require the attorney to become a witness on behalf of his client. Canon 19 provides:

"19. APPEARANCE OF LAWYER AS WITNESS FOR HIS CLIENT

"When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel: Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

This Court, as well as other courts, has recognized that a prosecuting attorney carries greater weight with a jury than other attorneys or witnesses. *In re: Sawyer* (1959), 360 U.S. 622, 667, 79 S. Ct. 1376, 1398, 3 L. Ed. 2d 1473; *Robinson v. U. S.* (CCA 8th 1929), 32 F. 2d 505, 510.

In *Robinson v. U. S.*, *supra*, at page 510, the Court had this to say:

"The function of a prosecuting attorney and a witness should be disassociated. A jury naturally gives to the evidence of the prosecuting attorney far greater weight than to the ordinary witness. . . . The tendency of a situation where a prosecutor in a criminal case becomes a witness for the government is to prevent somewhat that fair trial to which a defendant is entitled."

This is likewise the rule in certain state courts in criminal cases. *State v. Ryan*, 1933, 137 Kan. 733, 22 P. 2d 418; *Frank v. State*, 150 Neb. 745, 35 N.W. 2d 816.

Ethics has been defined as the "philosophy of morals . . . the standard of character set up by any race or nation."

The American Bar Association, in adopting its Canons of Ethics has set forth a standard of conduct expected of all attorneys, regardless of the type of cause advocated. In establishing a moral code, the American Bar Association has determined the right and wrong of an attorney's conduct. By those canons, it has designated Mr. Wever's conduct in the within cause as being unethical. The majority opinion of the Court of Appeals on remandment from this Court stated:

" . . . In a forum where the ethics of Wever's conduct is directly brought in issue by the State of Indiana, it is apparent that a charge of unethical conduct on the foregoing facts would be serious. However, in this case we cannot adjudicate a question of ethics . . . It is . . . reasonable to conclude that the jurors would react against the State in view of such conduct by its legal representative. However that may be, the most that can be said is that this conduct was error, but did not have such a substantial effect upon the outcome as to strip the trial of due process" (Tr. pp. 50-51).

And Judge Duffy, in his dissenting opinion, commented:

"Another reason for the failure of due process in the instant case is that one of the two state prosecuting attorneys who tried the case was acting as a witness on the trial . . . Such conduct was in violation of Canon 19 of the Canons of Professional Ethics. Such conduct was offensive to the rights of the defendant to a fair and impartial trial" (Tr. p. 53).

In the light of the Court of Appeals recognition of the serious breach of ethics by Mr. Wever's participation in this cause as hereinabove set out, which conduct the majority opinion admits to be "serious", if an action had been commenced against Mr. Wever by the "State", certainly

this defendant-appellant has established that Mr. Wever's conduct deprived him of a fair and impartial trial.

This Court in *Berger v. U. S.* (1935), 295 U.S. 78, 55 S. Ct. 629, 633, 79 L. Ed. 1314, in commenting upon the role of the prosecuting attorney and the weight afforded his conduct by jurors in a criminal prosecution states:

"The United States Attorney (or other prosecuting official) is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. * * *

"It is fair to say that the average jury in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

Even greater error is committed when the prosecutor is permitted to comment on his own testimony, re-testifying to things he had already testified to during the regular order of introduction of evidence during the trial. The

court would rightly refuse to permit either party to recall a witness who had already testified for the purpose of again letting the witness testify to the facts which he had previously testified under oath.

To be consistent it is submitted that a prosecutor-witness should not be given any more or greater rights, privileges or latitude than any other witness. Without a doubt no witness should be permitted to argue to the jury concerning testimony elicited from him while a witness for either party, and under such circumstances the opposing party is denied the right of cross examination, and both parties having rested, there is no way the opposing party can rebut the impression or otherwise contradict or counteract the additional evidence and testimony which the witness presents thereby in his argument to the jury.

It was obvious that Prosecutor Wever was using his position as a prosecuting attorney in this case to an unfair advantage. Why else would Prosecutor Wever, in a sample quote from his argument, state:

"I testified myself what was told me" (Tr. p. 4773).

Denial of the right to cross examine witnesses amounts to a violation of due process of law. *Alford v. U. S.* (1931), 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624, 627.

See also *Armes v. Pierce Governor Co.* (1951), 121 Ind. App. 560, 101 N.E. 2d 199, 203:

"The right to cross-examine witnesses under oath is not a rule of procedure or evidence. It is fundamental to due process, and cannot, unless waived, be denied by any trier of facts, any court, or administrative tribunal."

Defendant-appellant sincerely contends that Mr. Wever's conduct unquestionably violated Canon 19; that no action

by any bar group or court at this late date would in any way change the prejudicial effect which deprived this defendant-appellant of a fair and impartial trial. No action has ever been taken against Mr. Wever, nor has he been prejudiced in any way, as he moves from the office of prosecuting attorney to candidate for Circuit Judge.

This Court posed the following question with regard to the conduct of the prosecuting attorney in *In re: Sawyer* (1959), 360 U.S. 622, 79 S. Ct. 1376, 1398, 3 L. Ed. 2d 1473:

"If the prosecutor in this case had felt hampered by some of the rulings of the trial judge, and had assailed the judge for such rulings at a mass meeting, and a conviction had followed, and that prosecutor had been disciplined for such conduct according to orderly procedure for such disciplinary action, is it thinkable that this Court would have found that such conduct by the prosecutor was a constitutionally protected exercise of his freedom of speech, or, indeed, would have allowed the conviction to stand?"

Would the answer be any different if the prosecutor's conduct is in the court room, in the presence of the Judge and jury, where he stands as an official of the court, violating the very canons which he agrees to abide by when he enters into the practice of the legal profession? This Court should refuse to affirm this conviction, based upon the conduct of Mr. Wever.

VII.

Denial of Opportunity to Prove Actual Bias Upon Part of Certain Jurors Denied Petitioner a Fair Trial.

Petitioner challenged certain jurors for cause and made offers to prove that said jurors were biased against Petitioner, and that permitting them to serve under such circumstances would prevent the Petitioner from having a fair and impartial trial as guaranteed by the due process clause of the 14th Amendment to the Constitution of the United States.

For this reason, Juror William Hensley was challenged for cause: Petitioner's offer to prove appears in the transcript at pages 3848-3849, and reads as follows, to wit:

"The defendant challenged the juror for cause, the cause being that the juror shows by these answers and previous answers that he has a fixed and settled opinion as to the guilt of the defendant as to most of the facts and circumstances necessarily relied upon for a conviction by the State of Indiana; that said juror would not be an impartial juror as required by Article 1, Section 13, of the Constitution of the State of Indiana; to permit said juror to sit in this cause would be in violation of the defendant's rights as to Article 14 of the Federal Constitution of the United States; that the defendant further for his challenge states that said juror has an opinion as to the defendant's guilt as to the other offenses in the State of Kentucky charged, all of which the defendant now offers to prove."

The court overruled said challenge and offer to prove, denying Petitioner the opportunity to introduce evidence in support of said challenge (Tr. p. 3849).

For the above reason, Juror Jasper Johnson was also challenged for cause. Petitioner's offer to prove appears in the transcript at pages 3851-3852, and reads as follows, to wit:

"The defendant at this time challenges the juror for cause, the cause being that said juror shows by his answers now given and heretofore given that he has a fixed and settled opinion as to the guilt of the defendant as to most of the facts and circumstances necessarily relied upon for a conviction of this defendant by the State of Indiana; that said juror would not be an impartial juror as required by Article 1, Section 13, of the Constitution of Indiana, and to permit said juror to sit would be in violation of the defendant's rights under the 14th Amendment of the Federal Constitution of the United States, the same being the due process clause; and that said juror has an implied bias and prejudice against the defendant; that the defendant further challenges for cause that said juror has read of other similar offenses and has a fixed opinion against the defendant as to his guilt regarding the same, all of which the defendant now offers to prove."

The court overruled said challenge and offer to prove, denying Petitioner the opportunity to introduce evidence in support of said challenge (Tr. p. 3852).

For the above reason, Juror Phillip Montgomery was likewise challenged for cause. Petitioner's offer to prove appears in the transcript at pages 3854-3855, and reads as follows, to wit:

"The defendant challenges the juror for cause, the cause being that the said juror has read and heard of other offenses alleged to have been committed by this defendant, murder offenses, in the State of Kentucky,

and that said matters would be prejudicial against this defendant and for the reason of the same said juror would not be an impartial juror in this matter against this defendant, as provided by Article 1, Section 13, of the Indiana Constitution; and that to permit said juror to sit would be in violation of the defendant's rights under the 14th Amendment of the Federal Constitution of the United States, the same being the due process clause. The defendant further states and offers to prove at this time that said juror has an opinion as to the defendant's guilt of the crimes alleged to have been committed by this defendant in the State of Kentucky."

The court overruled said Challenge and offer to prove, denying Petitioner the opportunity to introduce evidence in support of said challenge (Tr. p. 3856).

For said reason, Juror Donald Higginbotham was also challenged for cause. Defendant-appellant's offer to prove appears in the transcript at page 3844, and reads as follows, to wit:

"The defendant challenges the juror for cause, the cause, being that the juror shows by his answers that he has a fixed opinion as to the guilt of the defendant as to most of the facts and circumstances necessarily relied upon by the State for a conviction; that said juror would not be an impartial juror as required by Article 1, Section 13 of the Constitution of the State of Indiana; and to permit said juror to sit would be in violation of the defendant's rights as to the 14th Amendment to the Federal Constitution of the United States as to due process, and defendant at this time offers to prove that the juror has an opinion as to the

defendant's guilt of other same and similar offenses, at which time the defendant offers to prove."

The court overruled said challenge and offer to prove, denying defendant-appellant the opportunity to introduce evidence in support of said challenge (Tr. p. 3845).

Due process requires that an accused be given a public trial after reasonable notice of the charges; that the defendant have the right to examine witnesses appearing against him; that he be represented by competent counsel and that he be afforded the right to call witnesses in his own behalf. *In re: Oliver* (1948), 333 U.S. 257, 68 S. Ct. 499, 507; 92 L. Ed. 682.

It is petitioner's contention that as with his arguments in support of motions for change of venue and continuance, that the guarantee of the right to an impartial jury is of little value if this Petitioner is denied the right to prove actual bias and prejudice upon the part of certain jurors. This Court, held in *Dennis v. U. S.* (1950), 339 U.S. 162, 171, 172, 70 S. Ct. 519, 521, 523, and at 525, where Justice Minton stated:

"Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."

This Court must assume that the offers to prove certain jurors biased were true, in that the Petitioner's offers to prove were denied, and Petitioner was not permitted to introduce evidence in support thereof, and the State of Indiana introduced no evidence, and did not offer to deny or contradict the evidence in Petitioner's offer to prove. *Lambert v. People* (1957), 335 U.S. 225, 78 S. Ct. 240, 242, 2 L. Ed. 2d 228.

Conclusion

Petitioner-appellant respectfully submits that the evidence at Petitioner's habeas corpus hearing clearly shows that he is being illegally and unlawfully restrained of his liberty as a result of a conviction in the Gibson Circuit Court of Gibson County, Indiana, where he was denied a fair and impartial trial, and which trial resulted in a conviction of murder and a sentence of death; that he was denied due process of law as guaranteed by the 14th Amendment to the Constitution of the United States, as evidenced by the questions presented by this brief, and supported by the dissenting opinion of Justice Duffy of the United States Court of Appeals for the Seventh Circuit.

Petitioner respectfully urges that for the reasons set forth herein this cause should be reversed by this Honorable Court.

Respectfully submitted,

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Order Granting Certiorari

SUPREME COURT OF THE UNITED STATES

No. 650 Misc.

OCTOBER TERM, 1959

LESLIE IRVIN, Petitioner,

—VS.—

A. E. DOWD, Warden.

On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari—February 23, 1960.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 722.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PETITION NOT PRINTED

No. 41

FILED

SEP 24 1960

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LESLIE IRVIN,

Petitioner,

v.

A. F. DOWD, WARDEN OF THE INDIANA STATE
PRISON AT MICHIGAN CITY, INDIANA,

Respondent.

RESPONDENT'S BRIEF

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MElrose 5-4456

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

LESLIE IRVIN,

Petitioner.

A. F. DOWD, WARDEN OF THE INDIANA STATE PRISON AT MICHIGAN CITY,
INDIANA,

No. 41

Respondent.

RESPONDENT'S BRIEF

Respondent accepts petitioner's statements as to the opinions below and the jurisdiction of this Court for the purpose of this appeal.

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

In addition to the constitutional provision and statute set out in petitioner's statement respondent submits the following:

"The following shall be good causes for challenge to any person called as a juror in any criminal trial:

"Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

Acts 1905, Ch. 169, Sec. 230, as found in Burns' Indiana Statutes (1956 Repl.), Section 9-1504.

QUESTIONS PRESENTED

The question presented here is whether or not the petitioner was afforded due process of law under the Fourteenth Amendment to the Constitution of the United States before and during his trial in the Gibson Circuit Court at Princeton, Indiana. In his brief he alleges the following as denials of due process based upon allegations of bias and prejudice in Gibson County where his trial occurred.

1. Jurors were permitted to serve who had a preconceived opinion as to petitioner's guilt.
2. The trial court's refusal to grant the second change of venue.

3. The trial court's action in denying a hearing on petitioner's motion for change of venue.

4. The overruling of petitioner's motions for continuance.

5. Trial court's action in denying a hearing on petitioner's motions for continuance.

Petitioner also alleges a denial of due process of law in the following respects:

1. The admission into evidence of a confession made by the petitioner.

2. The actions of the prosecuting attorney in participating as such attorney in the trial and also appearing as a witness on behalf of the State.

STATEMENT OF THE CASE

In his statement of the case petitioner sets out lengthy excerpts from the transcript on the *voir dire* examination which excerpts are accepted by the respondent as correct except that the respondent reserves the right to make specific reference to additional portions of the transcripts on *voir dire* for the purpose of emphasizing and clarifying the trial court's action with respect to the Indiana statute on qualification of jurors.

In his statement of the case in his brief at page 60 to page 68, the petitioner sets out a lengthy objection to the introduction into evidence of his confession which statement might lead this Court to believe the trial court did not conduct a hearing as to the admissibility of this confession.

Respondent would respectfully call this Court's attention to the trial court transcript vol. 2, page 1306, to vol. 3, page 1613, which contains the record of the hearing had in the trial court concerning the admissibility of petitioner's confession.

SUMMARY OF ARGUMENT

The State of Indiana, when faced with the duty of prosecuting Leslie Irvin for the murder of Whitley Wesley Kerr was presented with a problem which has long plagued law enforcement officers everywhere. The nature of the alleged crime had given rise to newspaper, radio and television publicity throughout the community and surrounding areas and in fact had been a major news story on the nation-wide wire services. Understandably the citizens of Vanderburgh County and in fact the citizens of Indiana, Kentucky and the surrounding States had been greatly alarmed by the nature of the crimes committed. However, at no time was there any threat of mob violence or any indication that the sheriff of Vanderburgh County would not be able to carry out his duty of protecting the prisoner and presenting him for trial in the due course of events. The question of the publicity given to the crime and the arrest of the petitioner comes into focus only when one considers whether or not the jury which in fact tried the petitioner was biased and prejudiced against him. The *voir dire* examination discloses that each juror honestly stated that he had read news stories and heard radio broadcasts concerning the petitioner's arrest and the nature of the crime with which he was charged. However, each of these jurors was examined by the trial judge pursuant to the pertinent Indiana statute governing the qualification of jurors and each juror qualified under this

statute. Should this Court hold that the Indiana statute is unconstitutional it is seriously doubted whether any jury could ever be chosen to try a case of like proportions.

The questions raised by petitioner concerning a denial of a second change of venue are controlled by Indiana procedural law and petitioner has failed to demonstrate that he was prejudiced by proceeding to trial in Gibson County as opposed to proceeding to trial in any other county in the State of Indiana. It is respectfully submitted that due consideration must be given to the practicalities of conducting a trial on any given issue within reasonable distance of the residences of the witnesses who will be required to testify.

The trial court exercised sound discretion in refusing to grant a continuance in this cause for the reason that nearly eleven months had elapsed since the commission of the crime and nearly eight months had elapsed since the petitioner had been arrested.

Petitioner was not denied due process of law because of the testimony of the prosecuting attorney. The prosecutor did not purport to have any knowledge of the guilt or innocence of the petitioner other than what was related directly to him by the petitioner himself at an interview requested by the petitioner. This interview was had in the presence of other officers who also testified at the trial.

ARGUMENT

I

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART 1 OF HIS ARGUMENT START- ING IN HIS BRIEF AT PAGE 76

Under the first point of his brief petitioner claims a violation of his constitutional rights in that he was forced to trial before a jury which he alleges was composed of jurors with a preconceived opinion that he was guilty. In support of this contention petitioner quotes from the dissenting Opinion of Judge Duffy of the Seventh Circuit wherein Judge Duffy stated that in his opinion the petitioner did not have a fair trial for the reason that more than half of the jurors who sat in the case had preconceived opinions that petitioner was guilty of the offense charged.

In writing his dissenting Opinion Judge Duffy cited two cases:

In re Murchison (1955), 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942;

Baker v. Hudspeth, 10th Circuit, 129 F. 2d 779.

While it is true that both of these cases state the general principle that the trier of fact must be without prejudice against the accused, neither case uses language which would be particularly applicable to the present situation.

In *In re Murchison*, this Court was concerned with a situation existing in Michigan wherein a single judge acts as a grand jury. In that case the same judge, who indicted the defendant also acted as trial judge in the trial of the

accused. This Court properly held that such a situation deprived the defendant of due process of law under the Fourteenth Amendment.

In *Baker v. Hudspeth*, the qualifications of one of the jurors was questioned because he was an assistant postmaster, which fact was unknown to the petitioner at the time he was selected. The Circuit Court of Appeals for the Tenth Circuit properly held that such a juror was not disqualified as having undue interest in the litigation.

Citing: *United States v. Wood* (1936), 299 U. S. 123, 57 S. Ct. 177, 81 L. Ed. 78.

Although the cases relied upon by Judge Duffy unquestionably hold that to be tried by jury made up of jurors with a preconceived opinion of the defendant's guilt would be a denial of due process, it is submitted that the authorities cited by Judge Duffy are not applicable to the actual situations existing in this case. Because of the wide dissemination of news in any given area where a crime may be committed it is essential that any given jurisdiction prescribed procedural steps whereby citizens who are called to jury duty in a case which has received wide publicity can be examined to determine if they are qualified to serve irrespective of the fact that they may have read, heard and discussed matters concerning the crime as reported by the various news dispensing agencies. Upon examination of the numerous cases which have discussed this problem it appears that the individual juror may be qualified if the information he has received has come solely through public news dispensing agencies. Provided further that the news releases do not purport to include verbatim testimony of witnesses at previous hearings concern-

ing the same case. Petitioner makes no claim that the alleged bias and prejudice in the community affected the trial judge or interfered with his presiding at the trial. He relies solely upon the answers given by the prospective jurors from their *voir dire* examination. There is no question but what some of the jurors when questioned admitted a preconceived opinion that petitioner was guilty. This is a situation which has long been recognized by this Court and courts in other jurisdictions. As early as 1864, the Indiana Supreme Court made this observation from *Fahnestock v. State* (1864), 23 Ind. 231, 236:

“ * * * The commission of a crime of the character of the one charged in this case, naturally produces more or less excitement in the vicinity of its enactment and with the various means of speedy communication existing almost everywhere in this country, intelligence of the act is very soon generally disseminated throughout the immediate community, and it would in many cases be impossible to find a jury, composed of men of ordinary intelligence, who had never heard of the case before being called into the jury-box. It is often impossible to avoid the formation of an opinion of some kind from mere hearsay or rumors. Such opinions, however, where the facts are only judged of by mere rumor, or the relation of persons not claiming to have any personal knowledge of them, would make but a slight impression on a mind of ordinary intelligence, and could scarcely form an impediment to a fair and proper conclusion from the legal evidence given on the trial. In this case the answer of the juror was, that he had partly formed an opinion from rumor, which would readily yield to the evidence. The question of his competency, under his statements, was left by the statute to the sound discretion of the court, and the facts do not show

an abuse of that discretion in refusing the challenge for cause. (Citing authorities.)”

The Indiana Legislature recognized this difficulty when adopted the present criminal code and sought to lay down a standard of qualification which would permit a trial court to proceed with a jury trial in the face of widespread publicity in the community. The pertinent part of its statute reads as follows:

....

“Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded on reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case.”

Acts 1905, Ch. 169, Sec. 230, as found in Burns' Indiana Statutes (1956 Repl.), Section 9-1504.

A search of the record reveals that the trial judge mistakenly applied this statute in questioning the jurors to the source of their information and as to their ability to disregard any information that they might have

acquired independent of the actual court room proceedings. The care with which the trial judge proceeded is demonstrated by the following excerpts from the record on the *voir dire* examination:

JUROR ERNEST HENSLEY testified that he had expressed an opinion as to the Petitioner's guilt or innocence and that it would require evidence directly from the Petitioner or somebody on his behalf to set aside that opinion. However, on further examination, he testified in substance that he would render his decision according to the evidence presented in court and that he understood that a person charged of a crime is innocent until proven guilty and that he would give the Petitioner the benefit of that principle of law and that if the State of Indiana failed by the evidence to prove the Petitioner guilty beyond any reasonable doubt, that he would acquit him and that the belief he entertained in his own mind was not strong enough to convict any man, that it would require evidence to convict him. He further testified that the opinion which he entertained at that time was based on what he read and that was the sole source of his information and that his mind was still open to the reception of evidence. He further testified that he would not consider any information that he had received outside the court room and would consider those matters that he had previously heard only if they were presented in open court.

(Tr., Vol. 5, p. 3659, l. 19 to p. 3667, l. 5.)

JUROR FRANK ROBINSON, in addition to the matter set out beginning at page 31 of Petitioner's brief, testified that he had expressed the opinion that defendant was guilty and that he had formed that opinion by reading news-

papers at that time. On further examination by the trial court the following appears in the record:

"Q. Mr. Robinson, I believe on several occasions you have told the lawyers on both sides of the case and told me that regardless of any opinion that you might have once had as to the guilt or innocence of the defendant, that you could and would lay that opinion aside and decide this case solely and impartially upon the law and the evidence introduced in this court room.

"A. I have.

"Q. And that's the way you feel about it now?

"A. I certainly do."

(Tr., Vol. 6, p. 3890, ll. 12-21.)

JUROR DONALD HIGGINBOTHAM testified that he had formed an opinion as to the Petitioner's guilt or innocence. However, on examination, he testified that he realized that he would be required to base his opinion entirely on the law and the evidence and would be required to lay aside his opinion and not let that opinion influence his verdict and that if the State failed to prove beyond any reasonable doubt that the Petitioner was guilty, that he would return a verdict of not guilty and that if the State failed to prove its case he would find the Petitioner not guilty, regardless of whether or not he took the stand or offered any witnesses in his favor, that the opinion he entertained was based on reading of newspapers and listening to the radio.

(Tr., Vol. 3, p. 2160, l. 3 to p. 2163, l. 13.)

JUROR CLIFFORD MONTGOMERY felt that the Petitioner should testify in his own behalf. However, on further examination, this juror testified as follows:

"A. I think not. I got confused on that yesterday. Not thoroughly understanding that the State of Indiana didn't require—gave the defendant the privilege of not having to testify in his own behalf, and if that's the law, that's the way I would try to decide it."

(Tr., Vol. 4, p. 2630, ll. 6-10.)

JUROR WILLIAM HENSLEY testified that he had formed an opinion based upon the newspaper articles at the time of the alleged crime. This juror was questioned by the court in the following manner:

"Q. Mr. Hensley, whether or not you could give this defendant a fair and impartial trial based solely upon the law and evidence introduced in this court room?"

"A. I certainly could, Judge. Not that I want to sit here, but I can give the man as fair a trial as I would expect."

(Tr., Vol. 6, p. 3849, ll. 18-23.)

JUROR JASPER JOHNSON testified that he had an impression as to the guilt of the Petitioner. This juror was also questioned by the court as follows:

"Q. Now, Mr. Johnson, I believe on numerous occasions you have told counsel on both sides and also told this court that regardless of any opinion or impression that you ever had, that you could lay that impression aside and try this case solely upon the law and the evidence introduced here and arrive at your ver-

dict solely upon the law and evidence as introduced in this court room, is that right?

"A. Yes, sir.

"Q. And that's the way you feel about it?

"A. Yes, Sir."

(Tr., Vol. 6, p. 3852, ll. 17-27.)

JUROR PHILIP MONTGOMERY also testified that he had an opinion regarding the guilt of the Petitioner. Further examination of the transcript discloses that he also stated that his opinion was not formed as to Petitioner in particular. (Tr., Vol. 6, p. 3853, ll. 7-12). On further questioning by the court the following appears:

"Q. Mr. Montgomery, I will ask you whether or not you have been examined on this matter on several different occasions both by the State and the defense?

"A. Yes, sir, I have.

"Q. And I believe you stated at that time on all of these examinations that even though you might have at one time had an opinion, that you would lay that opinion aside and give this man a fair and impartial trial based solely and entirely upon the law and evidence introduced in this court room?

"A. I did that, sir.

"Q. And that's what you will do?

"A. Yes, sir."

(Tr., Vol. 6, p. 3855, ll. 18-30.)

JUROR NEWMAN GWALTNEY, upon examination by the trial court, testified that he had not formed any opinion as to the guilt or innocence of the defendant.

(Tr., Vol. 6, p. 3897, l. 25, to p. 3898, l. 9.)

JUROR EUGENE PEMBERTON. An examination of the matter set out by the Petitioner in his Brief at page 56 clearly discloses that juror Pemberton qualified in that he expressly stated in response to several questions that he did not have an opinion as to the guilt or innocence of the defendant.

JUROR RALPH W. BAILEY testified that he had a belief that the Petitioner was guilty and that he had formed such opinion from reading the newspaper articles concerning this case. However, on further examination, this juror testified as follows:

"A. No, I don't say I have formed an opinion, I believe if it can be proven in court that the man is guilty, that's the way I would feel about it.

"Q. That's the way it should be.

"A. That's right:

"Q. But you mean to tell me, though, after reading all these matters in the newspapers, having all the conversation there where you worked, that from reading those newspapers and hearing these different stories, you didn't form any opinion as to the defendant's guilt or innocence?

"A. No, I don't believe I have yet. As I say, I believe it is up to the court to prove the man guilty.

"Q. Up to the Prosecutor?

"A. Yes, sir, the Prosecuting Attorney."

(Tr., Vol. 6, p. 4298, ll. 16-30.)

It is submitted that an examination of the foregoing and an examination of the entire record clearly discloses that every juror was honest enough to state that he had read the newspaper articles of the alleged crime and that he had heard radio broadcasts concerning said crime. Yet, at the same time, it is obvious from an examination of the record that the jurors learned much more from the questions propounded by defense counsel than they had learned previously from outside sources. The tactics of the defense counsel seemed to have been first to inform the prospective juror not only of the publicity concerning the crime in question, but also as to the other alleged crimes committed both in Indiana and Kentucky. And after having so informed a prospective juror, counsel would then turn to the Court and would in substance state: "This man is now informed as to the alleged crime at issue and of other alleged crimes which he should not consider to such an extent that he is disqualified." This general procedure is demonstrated by the following:

"Q. You expressed, also, an opinion that the defendant had confessed to this particular crime.

"A. I don't believe I have. I don't remember even reading that he confessed. In fact, I learned more sitting here than I remembered about what I read in the paper."

(Tr., Vol. 6, p. 3888, ll. 23-27.)

At page 82 of his brief, the petitioner cites *Coughlin v. People* (1893), 144 Ill. 140, for the proposition that due process requires that every member of the jury must be fair and impartial toward the accused. An examination of this case discloses that the Illinois court was there concerned with a statute very similar to the above-quoted Indiana statute. The Court specifically held that such a statute properly applied did not violate the defendant's constitutional rights. However, the Court there examined the evidence and found that the examination of the jurors disclosed that they were individually prejudiced against a certain secret society to which the defendant belonged. The Court thus found that the jurors did not qualify under the Illinois statute.

The necessity of coping with this difficult situation was recognized by this Court as early at 1878 when it stated:

... The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be

tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. * * *

Reynolds v. United States (1878), 98 U. S. 145, 155, 25 L. Ed. 244.

This same question arose upon the application of a similar New York statute and this Court made the following observation:

"The petitioners assert that, in view of unfair and lurid newspaper publicity, it was impossible to obtain an impartial jury in the county of trial, and that the rulings of the court denying a change of venue, and on challenges to prospective jurors, resulted in the impanelling of a jury affected with bias. We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established. Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury, *such assertion raises no due process question requiring review by this court.*" (Italics supplied.)

Buchalter v. New York (1943), 319 U. S. 427, 430, 63 S. Ct. 1129, 87 L. Ed. 1492.

In view of the position taken by this Court with regard to the ability of trial courts to control newspaper comment on pending litigation, (see: *Craig v. Harney* (1947), 331 U. S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546; *Pennekamp v. Florida* (1946), 328 U. S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295; *Bridges v. California* (1941), 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192). It becomes apparent that statutes

such as the Indiana statutes above quoted are an essential tool for the use of a trial court in the conduct of criminal cases. The real question then before this Court with regard to the qualification of jurors is whether or not the trial judge made proper application of the statute. An examination of the entire record on *voir dire* clearly indicates that the prospective jurors had been influenced only by newspaper publicity not unlike publicity attendant to the commission of any heinous crime. The answers given by these prospective jurors were not unlike answers one could logically expect from laymen who had a normal interest in current events. They were merely attempting to answer the questions of the court and counsel in a forthright manner. It is inconceivable that their answers could have been otherwise at the time of the trial or at any subsequent time to and including the present date. The *voir dire* examination in its entirety discloses a desire on the part of these jurors to decide the case solely upon the evidence presented in the course of the trial.

II

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART II OF HIS ARGUMENT START- ING IN HIS BRIEF AT PAGE 83

Under the second point of his brief petitioner claims a violation of his constitutional rights in that he was denied a change of venue from Gibson County after having received a previous change of venue from Vanderburgh County. In so claiming the petitioner submits that Burns' Indiana Statutes (1956 Repl.), Section 9-1305, is unconstitutional. Judge Schnackenberg of the Seventh Circuit noted in his Opinion that this question as to the constitu-

tionality of the Indiana venue statute was raised for the first time in that Court, not having been raised in the Indiana Supreme Court, *Arvin v. State* (1957), 236 Ind. 384, 139 N. E. (2d) 898, nor in the Federal District Court, *Irvin v. Dowd* (1957), 153 F. Supp. 531, 536. This Court has previously stated that a Federal court of review will not consider a constitutional question which has not been raised in the lower court. This rule is invariably adhered to in cases from State courts.

Yakus v. United States (1944), 321 U. S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834.

However, Judge Schnackenberg, saw fit to deal with this question and points out that the petitioner cited no Federal court decisions to sustain his contention. The petitioner did cite the dissenting Opinion of Judge Emmert in *State ex rel. Fox v. LaPorte Circuit Court* (1957), 236 Ind. 69, 138 N. E. (2d) 875, and the subsequent companion case of *State ex rel. Gannon v. Porter Circuit Court* (1959), — Ind. —, 159 N. E. (2d) 713. An examination of Judge Emmert's dissenting Opinion in the Fox case discloses that he based his Opinion on the fact that the trial court judge had in fact found that the defendant could not have a fair trial in LaPorte County and therefore he would order the venue changed.

In the subsequent Gannon case, the Supreme Court allowed the change of venue when the prosecuting attorney also conceded that a fair trial could not be had in LaPorte County. In the case at bar the trial judge ruled against the petitioner, therefore, we do not have the same factual situation in this case as in the Fox and Gannon cases. They are, therefore, no authority for the position here taken by the petitioner.

III

IN ANSWER TO PETITIONER'S CONTENTIONS
UNDER PART III OF HIS ARGUMENT START-
ING IN HIS BRIEF AT PAGE 87

Under the third point of his brief petitioner claims a violation of his constitutional rights in that the trial court refused his motions for continuance.

The question of whether or not a continuance should be granted is a matter resting within the sound discretion of the trial court under Indiana state procedure.

Walker v. State (1894), 136 Ind. 663, 665, 36 N. E. 356.

The question then to be considered is whether or not the trial court abused its discretion in denying the motions for continuance. Respondent would show the Court that the crime was committed on December 23, 1954. Petitioner was arrested on April 8, 1955. On April 13, 1955, petitioner confessed to the commission of the crime.

(Trial Transcript, Vol. 2, p. 1336, l. 26 to p. 1337, l. 22.)

Thereafter the Vanderburgh County Grand Jury returned an indictment against the petitioner. Subsequently the petitioner asked for and was granted a change of venue from Vanderburgh County. It was not until November 14, 1955, that the *voir dire* examinations began in Gibson County. This was almost eleven months after the crime had been committed and eight months after the petitioner had made his confessions which had been highly publicized in Vanderburgh County. When one considers the elapse

of time between petitioner's arrest and the trial in Gibson Circuit Court it becomes apparent that there was no abuse of discretion on the part of the trial court in not granting any further delay of the trial. If the contentions of the petitioner are to be carried to a logical conclusion the trial court would have no alternative but to eventually dismiss the case because of an inability to secure an impartial jury.

In support of his position at page 90 of his brief petitioner cites the case of *Liese v. State* (1954), 233 Ind. 250, 118 N. E. (2d) 731. At page 254, the Supreme Court of Indiana stated that such an application is addressed to the sound discretion of the trial court whose ruling may not be disturbed in the absence of the abuse of that discretion. There is no claim in this case by the petitioner that he was subjected to any disorderly conduct in or about the jail or the trial court or that he at any time feared for his safety because of bias and prejudice which he alleges existed in Gibson County. His only claim to prejudicial treatment is his claim that the jurors who tried the case were prejudiced against him. The record in this case clearly demonstrates that the jurors were carefully and properly qualified under the Indiana statute, thus petitioner received every constitutional and statutory guarantee afforded him under the Indiana law and the Constitution of the United States.

The United States Constitution, Fourteenth Amendment;

Indiana Constitution, Article 1, Section 13,

Indiana Acts 1905, Ch. 169, Sec. 230, as found in Burns' Indiana Statutes (1956 Repl.), Section 9-1504.

In his brief at page 93 petitioner quotes from the case of *Shepherd et al. v. Florida* (1951), 341 U. S. 50, 71 S. Ct. 549, 95 L. Ed. 740, for the proposition that the petitioner was denied due process by reason of press releases made by authorities. An examination of that case discloses that the local sheriff was quoted by the newspapers as saying that the defendant had confessed to the crime charged. In holding such newspaper publicity would be prejudicial to the defendant, this Court observed that although this supposed confession received wide publicity there was in fact no confession introduced into evidence in the trial court. In the case at bar, although petitioner's confession was referred to in news publications it was in fact properly introduced in evidence after a lengthy hearing as to its admissibility in the trial court. An examination of the various press statements set out by the petitioner in his brief starting at page 98 fails to disclose any language which would indicate that the local authorities were in any way attempting to try their case in newspapers prior to the beginning of the actual trial. The authorities did no more than to briefly and factually answer the questions asked by reporters and nowhere does petitioner claim that authorities were guilty of releasing false information concerning his case.

IV

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART IV OF HIS ARGUMENT START- ING IN HIS BRIEF AT PAGE 103

Under the fourth point of his argument petitioner claims denial of due process in that he was not afforded hearings on his motions for continuance and change of venue.

Under the Indiana statute above cited the petitioner was limited to one change of venue which he had in fact received. A continuance was a matter within the sound discretion of the trial court.

Walker v. State (1894), 136 Ind. 663, 665, 36 N. E. 356, *supra*.

The facts upon which the trial court exercised that discretion are as follows: The trial did not start until almost eleven months after the crime had been committed and eight months after the petitioner had confessed to the crime. These facts were contained in the trial court's intrinsic record of which he could take judicial notice. Under the circumstances it is submitted that a hearing would have been no aid to the trial judge in passing upon the granting of a continuance. The real question before the trial judge was whether or not at that time an impartial jury could in fact be obtained. The record discloses that he patiently and carefully proceeded through the *voir dire* examination and did in fact obtain a jury which was as well qualified as one could expect to obtain in a criminal case of great notoriety irrespective of the time of the trial with relation to the time of the commission of the offense.

V

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART V OF HIS ARGUMENT START- ING IN HIS BRIEF AT PAGE 105

Under the fifth point of his argument petitioner states that the trial court refused to permit him to introduce evidence including his own testimony in support of his offer to prove the involuntary nature of his confession.

Petitioner has persisted in making this false allegation at every presentation of this case in the various Federal courts including the prior brief in this Court. Respondent would again refer the Court to the trial transcript which clearly discloses that an extensive hearing was had in the absence of the jury as to the arrest of the petitioner, his treatment while in custody and the manner in which his confession was obtained. The record of this hearing starts in the trial transcript in vol. 2, page 1306, and continues to vol. 3, page 1613. The particular objection to which petitioner refers in his point 5 came immediately following this extensive hearing. It would have been utterly ridiculous for the court to have repeated the hearing which it had just completed. The record clearly discloses that the petitioner was afforded every opportunity to question every phase of his incarceration and confession. He completely failed to demonstrate that he had been denied due process of law at any step beginning with his arrest and ending with his indictment by the Vanderburgh County Grand Jury. The record is clear and uncontradicted that petitioner was well treated at all times and that his confession was not only voluntary but in fact anxiously given in the hope that he would escape prosecution in the State of Kentucky.

VI

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART VI OF HIS ARGUMENT START- ING IN HIS BRIEF AT PAGE 108

In point six of his brief petitioner claims a violation of due process of law in that the prosecuting attorney was permitted to participate as such prosecutor through the

course of the trial and also was permitted to testify as a witness on behalf of the State.

An examination of Paul Wever's testimony as a witness for the State discloses that he testified to nothing except statements made directly to him by the petitioner. This evidence was cumulative having been testified to by officers who were also present at the interview. At no time during the course of the trial was Paul Wever guilty of any misconduct such as that in the case of *Berger v. United States* (1935), 295 U. S. 78, 55 S. Ct. 629, relied upon by the petitioner in support of this point. Although as pointed out by the petitioner and by Judge Duffy in his dissenting opinion in the Circuit Court of Appeals for the Seventh Circuit, this conduct on the part of Paul Wever is contrary to Canon 19 of the Canon for Professional Ethics, there is no showing that it in any way violated petitioner's right to due process of law. The jury was properly instructed that they could consider the interest of any witness in weighing his testimony. A search of the record discloses that every statement Paul Wever made on the witness stand is well supported by independent evidence from other witnesses. It is therefore submitted that this charge does not support the petitioner's contention of a denial of due process.

VII.

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART VII OF HIS ARGUMENT START- ING IN HIS BRIEF AT PAGE 114

Under point seven of his brief petitioner claims that he was denied a fair trial and that he did not have an opportunity to prove actual bias of certain jurors.

The question as to the bias and prejudice of the various jurors has been covered in previous parts of this brief. This contention of the petitioner in view of the record of the trial court is completely unwarranted. The record disclosed that each juror was extensively examined by the petitioner and that at no time was he ever deprived of his right to examine a prospective juror. If for the sake of argument it is conceded that an offer to prove can be used in the manner here attempted the offers as made by the petitioner fail to disclose facts upon which he based his offers, but merely recite conclusions based upon the prospective juror's prior testimony. The trial court properly overruled such offers to prove.

Malone v. State (1911), 176 Ind. 338, 343, 96 N. E. 1.

CONCLUSION

Respondent respectfully submits that the Circuit Court of Appeals for the Seventh Circuit was correct in finding that the trial court afforded the petitioner every constitutional right under the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Respondent prays that the Opinion and decision of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 41.—OCTOBER TERM, 1960.

Leslie Irvin, Petitioner,

v.

A. F. Dowd, Warden.

On Writ of Certiorari
to the United States
Court of Appeals for
the Seventh Circuit.

[June 5, 1961.]

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a habeas corpus proceeding, brought to test the validity of petitioner's conviction for murder and sentence of death in the Circuit Court of Gibson County, Indiana. The Indiana Supreme Court affirmed the conviction in *Irvin v. State*, 236 Ind. 384, 139 N. E. 2d 898, and we denied direct review by certiorari "without prejudice to filing for federal habeas corpus after exhausting state remedies." 353 U. S. 948. Petitioner immediately sought a writ of habeas corpus, under 28 U. S. C. § 2241,¹ in the District Court for the Northern District of Indiana, claiming that his conviction had been obtained in violation of the Fourteenth Amendment in that he did not receive a fair trial. That court dismissed the proceeding on the ground that petitioner had failed to exhaust his state remedies. 153 F. Supp. 531. On appeal, the Court of Appeals for the Seventh Circuit affirmed the dismissal. 251 F. 2d 548. We granted certiorari, 356 U. S. 948, and

¹ Section 2241 provides in pertinent part:

"(a) Writs of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions.

"(c) The writ of habeas corpus shall not be extended to a prisoner unless . . .

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States."

remanded to the Court of Appeals for decision on the merits or remand to the District Court for reconsideration. 359 U. S. 394. The Court of Appeals retained jurisdiction and decided the claim adversely to petitioner. 271 F. 2d 552. We granted certiorari. 361 U. S. 959.

As stated in the former opinion, 359 U. S., at 396-397:

"The constitutional claim arises in this way. Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized, stating that the petitioner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner, counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue."

During the course of the *voir dire* examination, which lasted some four weeks, petitioner filed two more motions for a change of venue and eight motions for continuances. All were denied.

At the outset we are met with the Indiana statute providing that only one change of venue shall be granted "from the county" wherein the offense was committed.² Since petitioner had already been afforded one change of venue, and had been denied further changes solely on the basis of the statute, he attacked its constitutionality. The Court of Appeals upheld its validity. However, in the light of *Gannon v. Porter Circuit Court*, — Ind. —, 159 N. E. 2d 713, we do not believe that argument poses a serious problem. There the Indiana Supreme Court held that if it was "made to appear after attempt has actually been made to secure an impartial jury that such jury could not be obtained in the county of present venue . . . it becomes the duty of the judiciary to provide to every accused a public trial by an impartial jury, even though to do so the court must grant a second change of venue and thus contravene [the statute]" — Ind., at —, 159 N. E. 2d, at 715. The prosecution attempts to distinguish that case on the ground that the District Attorney there conceded that a fair trial could not be had in La Porte County and that the court, therefore, properly ordered a second change of venue despite the language of the statute. Inasmuch as the statute says nothing of concessions, we do not believe that the Indiana Supreme Court conditions the

² Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9-1305, provides in pertinent part: "When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases punishable by death, shall grant a change of venue to the most convenient county. . . . Provided, however, That only one [1] change of venue from the judge and only one [1] change from the county shall be granted."

duty of the judiciary to transfer a case to another county solely upon the representation by the prosecutor—regardless of the trial court's own estimate of local conditions—that an impartial jury may not be impaneled. As we read *Gannox*, it stands for the proposition that the necessity for transfer will depend upon the totality of the surrounding facts. Under this construction the statute is not, on its face, subject to attack on due process grounds.

England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, *Fay v. New York*, 332 U. S. 261; *Palko v. Connecticut*, 302 U. S. 319, every State has constitutionally provided trial by jury. See Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions 578-579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U. S. 257; *Tumey v. Ohio*, 273 U. S. 510. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or of his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville*, 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early

as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807).³ "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U. S. 145, 155.

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois*, 123 U. S. 131; *Holt v. United States*, 218 U. S. 245; *Reynolds v. United States*, *supra*.

The adoption of such a rule, however, "cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." *Lisenba v. California*, 314 U. S. 219, 236. As stated in *Reynolds*, the test is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of

³ "[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him."

mixed law and fact. . . .” At p. 156. “The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.” At p. 157. As was stated in *Brown v. Allen*, 344 U. S. 443, 507, the “so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.” It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors.

The rule was established in *Reynolds* that “[t]he finding of the trial court upon that issue [the force of a prospective juror’s opinion] ought not be set aside by a reviewing court, unless the error is manifest.” 98 U. S., at 156. In later cases this Court revisited *Reynolds*, citing it in each instance for the proposition that findings of impartiality should be set aside only where prejudice is “manifest.” *Holt v. United States*, *supra*; *Spies v. Illinois*, *supra*; *Hopt v. Utah*, 120 U. S. 430. Indiana agrees that a trial by jurors having a fixed, preconceived opinion of the accused’s guilt would be a denial of due process, but points out that the *voir dire* examination discloses that each juror qualified under the applicable Indiana statute.*

*Challenges for cause.—The following shall be good causes for challenge to any person called as a juror in any criminal trial:

“Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading

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It is true that the presiding judge personally examined those members of the jury panel whom petitioner, having no more peremptory challenges, insisted should be excused for cause, and that each indicated that notwithstanding his opinion he could render an impartial verdict. But as Chief Justice Hughes observed in *United States v. Wood*, 299 U. S. 123, 145-146: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

Here the buildup of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing. For example, petitioner's first motion for a change of venue from Gibson County alleged that the awaited trial of petitioner had become the *cause célèbre* of this small community—so much so that curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months

newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case." Burns Ind. Stat. Ann. § 1956 Replacement Vol. § 9-1564.

preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the *modus operandi* of these robberies was compared to that of the murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. Another characterized petitioner as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories petitioner was described as the "confessed slayer of six," a parole violator and fraudulent-check artist. Petitioner's court-appointed counsel was quoted as having received "much criticism over being Irvin's counsel" and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to repre-

sent Irvin. On the day before the trial the newspapers carried the story that Irvin had orally admitted the murder of Kerr (the victim in this case) as well as "the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhemina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky."

It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County. In fact, on the second day devoted to the selection of the jury, the newspapers reported that "strong feelings, often bitter and angry, rumbled to the surface," and that "the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions. . . ." A few days later the feeling was described as "a pattern of deep and bitter prejudice against the former pipe-fitter." Spectator comments, as printed by the newspapers, were "my mind is made up"; "I think he is guilty"; and "he should be hanged."

Finally, and with remarkable understatement, the headlines reported that "impartial jurors are hard to find." The panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were peremptorily challenged by petitioner and 10 by the State; 12 persons and two alternates were selected as jurors and the rest were excused on personal grounds, *e. g.*, deafness, doctor's orders, etc. An examination of the 2,783-page *voir dire* record shows that 370 prospective jurors or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opin-

ion) entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty. A number admitted that, if they were in the accused's place in the dock and he in theirs on the jury with their opinions, they would not want him on a jury.

Here the "pattern of deep and bitter prejudice" shown to be present throughout the community, cf. *St. Able v. California*, 343 U. S. 431, was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. See *Delaney v. United States*, 199 F. 2d 107. Where one's life is at stake—and accounting for the frailties of human nature—we can only say that under the light of the circumstances here the finding of impartiality does not meet constitutional standards. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he "could not . . . give the defendant the benefit of the doubt that he is innocent." Another stated that he had a "somewhat" certain fixed opinion as to petitioner's guilt. No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." With his life at

stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt? *Stroble v. California*, 343 U. S. 181; *Shepherd v. Florida*, 341 U. S. 50 (concurring opinion); *Moore v. Dempsey*, 261 U. S. 86.

Petitioner's detention and sentence of death pursuant to the void judgment is in violation of the Constitution of the United States and he is therefore entitled to be freed therefrom. The judgments of the Court of Appeals and the District Court are vacated and the case remanded to the latter. However, petitioner is still subject to custody under the indictment filed by the State of Indiana in the Circuit Court of Gibson County charging him with murder in the first degree and may be tried on this or another indictment. The District Court has power, in a habeas corpus proceeding, to "dispose of the matter as law and justice require," 28 U. S. C. § 2243. Under the predecessors of this section, "this Court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected." *Mahler v. Eby*, 264 U. S. 32, 46. Therefore, on remand, the District Court should enter such orders as are appropriate and consistent with this opinion, cf. *Grandinger v. Borey*, 153 F. Supp. 201, 240, which allow the State a reasonable time in which to retry petitioner. Cf. *Chessman v. Teets*, 354 U. S. 156; *Dowd v. Cook*, 340 U. S. 206; *Ped v. Waldman*, 266 U. S. 113.

Vacated and remanded.

SUPREME COURT OF THE UNITED STATES

No. 41.—OCTOBER TERM, 1960.

Leslie Irvin, Petitioner,

v.

A. F. Dowd, Warden.

On Writ of Certiorari
to the United States
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[June 5, 1961.]

MR. JUSTICE FRANKFURTER, concurring.

Of course I agree with the Court's opinion. But this is, unfortunately, not an isolated case that happened in Evansville, Indiana, nor an atypical miscarriage of justice due to anticipatory trial by newspapers instead of trial in court before a jury.

More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.

Not a Term passes without this Court being importuned to review convictions had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury. See *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 915. For one reason or another this Court does not undertake to review all such enveloped state prosecutions. But, again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome. *Janko v. United States*, ante, p. —; see, e. g., *Marshall v. United States*, 360 U. S. 319. See also *Stroble v. California*, 343 U. S. 181, 198 (dissenting opinion); *Shepherd v. Florida*, 341 U. S. 50 (concurring opinion). This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.